Supreme Court, U. S.
FILED
JUN 28 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Special Appeals of Maryland

PETER C. ANDRESEN
Petitioner
3514 Plyers Mill Road
Kensington, Maryland 20795

ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-6537

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	6
ARGUMENT	15
CONCLUSION	33

TABLE OF AUTHORITIES CITED

Cases:

Aguilar v. Texas,
378 U.S. 108 (1964) 29

Bellis v. United States,
417 U.S. 85 (1974) 16, 18

Boyd v. United States,
116 U.S. 616 (1886) 18, 19, 20, 21

Brady v. Maryland,
373 U.S. 83 (1963) 7, 33

Bumper v. North Carolina,
391 U.S. 543 (1968) 23

Chapman v. California,
386 U.S. 18 (1967) 33

Couch v. United States,
409 U.S. 322 (1973) 17, 19

Page

Curcio v. United States,
354 U.S. 118 (1957) 19

Entick v. Carrington,
19 How. St. Tr. 1029 (1765) 20

Gouled v. United States,
255 U.S. 298 (1921) 20, 21

Griswald v. Connecticut,
381 U.S. 479 (1965) 19

Hill v. Philpott,
445 F.2d 144 (C.A. 7),
cert. denied, 404 U.S. 991 (1971) . . 8, 9, 16, 18, 19, 21

Huber v. State,
2 Md. App. 245 (1967) 28

McEwan v. State,
194 Md. 494 (1950) 28

Miller v. Pate,
386 U.S. 1 (1967) 33

Miranda v. Arizona,
384 U.S. 436 (1966) 7

Polisher v. State,
11 Md. App. 555 (1971) 26

Schmerber v. California,
384 U.S. 757 (1965) 21

Stuart v. United States,
416 F.2d 459 (C.A. 5, 1969) 19

United States v. Blank,
459 F.2d 383 (C.A. 6),
cert. denied, 409 U.S. 887 (1972) . . . 8, 9, 16, 17, 18

United States v. Lefkowitz,
285 U.S. 452 (1932) 20

Page

Warden v. Hayden,
387 U.S. 294 (1967) 7, 20, 21, 27

Weeks v. United States,
232 U.S. 383 (1914) 20

Wilson v. United States,
221 U.S. 361 (1911) 19

Constitutional Provisions:

Constitution of the United States —
Amendment IV 3
Amendment V 3
Amendment XIV 4
Constitution of Maryland 10, 31

Statutes:

Annotated Code of Maryland —
Article 5 — Section 5 . . . . . 4, 22
Article 27 — Section 551 . . . . . 4, 26
Courts & Judicial Proceedings Article,
§12-201 5
§12-203 . . . . . 5, 32

United States Code —
Title 28 — Section 1257(3) 2

Rules:

Rules of the Supreme Court
Rule 19 15

Reference Works:

Cornelius, *The Law of Search and Seizure* 23

Wigmore, 8J *Evidence* 8

Supreme Court of the United States

OCTOBER TERM, 1974

No.

PETER C. ANDRESEN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Special Appeals of Maryland

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Peter C. Andresen, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Special Appeals of Maryland entered in the above-entitled case on January 10, 1975 upon which the Court of Appeals of Maryland, the highest Court of the State, denied certiorari on March 31, 1975.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 24 Md. App. 128, 331 A.2d 78 (1975), and is printed in the Appendix hereto, *infra*, page A-1.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland, which is sought to be reviewed, was dated January 10, 1975. (A-1) A timely Motion for Reargument and Modification of Opinion was denied and that Court's Mandate was issued on February 11, 1975. (A. 89, 90)

A timely Petition for Writ of Certiorari to the Court of Special Appeals of Maryland was filed in the Court of Appeals of Maryland, the highest Court of the State, and was denied on March 31, 1975. (A. 92) The time within which to petition for certiorari to this Honorable Court would therefore run from this date.

Motions for Statement of Reasons for Denial of Writ of Certiorari to the Court of Special Appeals and for Reconsideration of Petition for Writ of Certiorari to the Court of Special Appeals were denied by the Court of Appeals of Maryland on April 10, 1975. (A. 93)

The jurisdiction of this Court is invoked under *28 U.S.C., Sec. 1257(3).*

QUESTIONS PRESENTED FOR REVIEW

I. May an attorney at law, who is a sole practitioner, invoke his privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction of his personal handwritten notes

and memoranda, books and records, which were seized from his desk and files in his personal office, under a search warrant held to be otherwise reasonable, into evidence against him at his criminal trial?

II. Was the search of petitioner's offices violative of Amendment IV to the Constitution of the United States?

III. Was the petitioner denied his rights to due process and equal protection of the laws as guaranteed by Amendment XIV to the Constitution of the United States, because he did not receive a fair trial due to the cumulative effects of the actions of the prosecution and the State Courts?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States: Amendment IV –
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V –
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation."

Amendment XIV –

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland:

Article 5, Sec. 5, -

No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Article 27, Sec. 551, -

Whenever it be made to appear to any judge . . . by a written application signed and sworn to by the applicant, accompanied by an affidavit or affidavits containing facts within the personal knowledge of the affiant or affiants, that there is probable cause, the basis of which shall be set forth in said affidavit or affidavits, to believe that any misdemeanor or felony is being committed by any individual

or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge . . . or that any property subject to the seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then such judge . . . may forthwith issue a search warrant directed to any duly constituted policeman . . . authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that any such warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched, the grounds for such search and the name of the applicant on whose written application as aforesaid the warrant was issued.

Courts & Judicial Proceedings Article –

§ 12-201. Certiorari to the Court of Special Appeals.

Except as provided in § 12-202 of this title, in any case or proceeding pending in or decided by the Court of Special Appeals upon appeal from a circuit court, any party, including the state, may file in the Court of Appeals a petition for certiorari to review the case or proceeding. The petition may be filed either before or after the Court of Special Appeals has rendered a decision, but not later than 30 days after its mandate has been issued. In a case or proceeding described in this section, the Court of Appeals also may issue the writ of certiorari on its own motion.

§ 12-203. Action by Court of Appeals.

If the Court of Appeals finds that review of the case described in § 12-201 is desirable and in the public interest, the Court of Appeals shall require by writ of certiorari that

the case be certified to it for review and determination. The writ may issue before or after the Court of Special Appeals has rendered a decision. The Court of Appeals may by rule provide for the number of its judges who must concur to grant the writ of certiorari in any case, but that number may not exceed three. Reasons for the denial of the writ shall be in writing.

STATEMENT OF THE CASE

The "inner sanctum" of Petitioner's law offices and files was invaded in October, 1972, by police officers and members of the State's Attorney's staff armed with an alleged warrant to search the premises. The searchers, approximately eight in number, spent the greater part of six hours rummaging through Petitioner's desk and private files. All of the private papers, documents and handwritten notes present and belonging to the Petitioner were scanned, many were examined with detail. Upon completion of the search, the officers carried literally thousands of such testimonial and communicative papers away with them.

On the next day Petitioner was charged by a Bill of Information with four counts of false pretenses, containing virtually the same substance as contained in the application for the search warrant. About two weeks later, after thorough examination of the seized papers by the searchers, Petitioner was indicted on approximately fifty (50) additional counts. The subject matter of all of the estimated fifty-four (54) counts was significantly disclosed by the private papers taken.

The State elected to try Petitioner on the original four counts consolidated with seventeen other counts, forming one of the indictments, for a total of twenty-one (21)

counts. Petitioner filed a motion to suppress the papers seized, among others. At the pre-trial hearing thereon, the State elected to present only a small fraction of the papers seized as pertaining to the charges upon which Petitioner was to be tried. These papers still numbered in the hundreds. A great portion of the papers presented at the hearing was suppressed by the trial judge; but a significantly large number were not. This conclusion was reached by the trial court by its application of *Warden* v. *Hayden*, 387 U.S. 294 (1967) to petitioner's case by stating in its Memorandum Opinion and Order that:

> "The Hayden case, however, overruled this distinction and held that the Fourth Amendment of the United States Constitution was not violated by the seizure of 'mere evidence' if there was proven to be a nexus between the items seized and the criminal behavior. This case held that 'mere evidence' may be seized if probable cause can be established that the evidence will aid in the particular apprehension or conviction. . . As to the excepted items, it appears to the Court that the State has conclusively shown a nexus between them and the alleged criminal behavior."

The trial court also rejected all of petitioner's attacks upon the warrant, its reasonableness and the extent of the search, whether authorized by the warrant or not. In specifically rejecting petitioner's Fifth Amendment claim that the private papers seized could not be used against him, since they were privileged, the trial court held:

"The thrust of defendant's argument here is that he has the right of privacy in and over his person, house, papers and effects, on the ground that to permit these items to be introduced into evidence would be a prohibition against compulsory self-incrimination.

"On this point there seems to be no Maryland law, and in two cases before the Federal system, the Courts took opposite views and in both cases certiorari was denied by the United States Supreme Court.

"In *United States* v. *Blank*, 459 Fed. 2d 383 [Sixth Circuit, 1972], the United States Court made a distinction between those records sought by subpoena and records sought by search warrant. They held that there was a valid and important distinction. The subpoena compels the person receiving it by his own response to identify the document and deliver as the one described in the subpoena; the search warrant involves no such element of compulsion upon an actual or potential defendant. In the *Hill* v. *Philpott* case, 445 Fed. 2d 145, Second Circuit (sic), the Court held that the subpoena-search warrant distinction was 'more shadow than substance,' and held that the seizure of personal papers of the defendant was in violation of the Fifth Amendment. The Blank case in effect rejected the holdings in the Philpott case, and seems to this Court to be the better law. 8J, Wigmore, *Evidence*, Sec. 2264 [McNaughton, Rev., 1961]. It is conceded in this case that evidence

produced by the defendant in response to a subpoena *duces tecum* would be in violation of the Fifth Amendment, but it is argued that evidence received as a result of the search warrant compels the defendant to do nothing. Relying on the Blank case and Wigmore on *Evidence*, this Court holds that the seizure of the excepted items by search warrant does not violate the Fifth Amendment to the United States Constitution."

Those papers remaining unsuppressed were introduced into evidence, over objection, at Petitioner's trial and were significantly important in leading to his conviction, as is evidenced by the Opinion of the Court of Special Appeals of Maryland. (A. 20, 24, 25)

The Court of Special Appeals, in upholding the decisions of the trial judge as to petitioner's Fourth and Fifth Amendment challenges, also identically rejected the holding of *Hill* v. *Philpott*, 445 F.2d 144 (C.A. 7), cert. denied, 404 U.S. 991 (1971), and adopted the holding of *Blank* v. *United States*, 459 F.2d 383 (C.A. 6), cert. denied, 409 U.S. 887 (1972) as controlling, just as the trial judge had done. (A. 28-54)

Petitioner's trial had been removed from Montgomery to Frederick County, Maryland (an adjoining county) for trial, due to prejudicial pre-trial publicity based chiefly on a press-release authored by the prosecution. (A. 1)

During the course of petitioner's trial he was, among other things discussed *infra* in the Argument section of this petition: Denied a Motion for Severance when, without offering one iota of proof, the State later abandoned those charges which had been requested to be severed,

which amounted to thirteen of the twenty-one counts (A. 69); denied a Motion for Continuance to allow defense counsel, who was engaged in another trial, to adequately prepare an affirmative defense and, also to await appellate decisions on two related cases (A. 68); denied a Reservation of Question for Court En Banc as to the Fifth Amendment objection raised in the Motion to Suppress, when such a Reservation is guaranteed by the *Constitution of Maryland* (A. 73); denied access to the prosecution's case because of evasive, uncooperative tactics by the prosecution and the outright suppression of the existence of an immunity agreement with the prosecution's chief witness, even though discovery orders had granted such access (A. 63-66); denied a Motion for a New Trial after the appellate rulings in the related cases referred to above were rendered, which directly contradicted material facts testified to by a witness at the original trial, along with other evidence, argument and jury instructions, so that a different result would probably have been required (A. 66-67, 78-81) and; was sentenced under criticism that he had continued to maintain his innocence (A. 81-84). These holdings were upheld by the Court of Special Appeals.

Petitioner contends that the cumulative effect of the above actions, when taken together with the closing argument of the prosecution, was so prejudicial that he was denied his rights to a fair trial and due process of law. Counsel for petitioner strenuously objected to the closing remarks of the prosecutor. There was, however, no curative instruction given to the jury. This argument and lack of curative instruction was upheld by the Court of Special Appeals as harmless or "inconsequential." (A. 54-57)

In leading into his concluding remarks, the prosecutor embarked with the following statement:

> "The evidence is before you now, because as a matter of law, the Court has ruled that there is sufficient evidence by which you can find the defendant guilty of the counts with which he remains charged at this point."

Defense counsel objected to this statement as being highly prejudicial, yet the trial judge did nothing but caution the prosecutor out of the hearing of the jury. No curative action whatsoever was taken by the trial court.

Subsequently, among his concluding remarks about petitioner, the prosecutor was allowed to exclaim, over subsequent objection:

> "He did it, he did it, he knew he did it, and he did it with fraudulent intent; he did it and he stuck the homeowners with it."

> "These are the truths – not the half-truths that have been coming out on cross-examination; not the partial truths that have been coming out on cross-examination; this is the totality of the thing, this is how it fits together . . . and this evidence points to one conclusion and one conclusion only – the conclusion it points to is that he did it, and he knows he did it, and everybody in this courtroom knows he did it; and he's guilty."

> "He knows it wasn't paid; there's no doubt about it, he knows it wasn't paid . . . he's guilty, he's guilty . . ."

"When you're dealing with settlement attorneys and they're stealing home buyer's money, there's more than one way to skin an alley cat. I have never seen a case as bad as this one. This has got to be stopped, and you are the only ones who can do it. We look to you to do something to stop it . . . I don't care what he says about mistake – the facts don't say it, the facts say one thing and one thing only – he did it. He did it, he did it, he did it. He's a bad man, and he did it. And that's all the facts seem to conclude – he did it."

" . . . and we are relying on you; the people are relying on you; the people down 70S are relying on you. You can go the easy way and just kind of say, 'Well, I'll give up and let the man go,' and maybe they'll give him a parade down Patrick Street and send him back down 70S to Montgomery County, and he'll thank you forever, and maybe he'll even open an office up here in Frederick because you were so kind to him."

"And I'm asking you just one final thing – don't flinch from your job, but if you do get hung up, if you do hang up and can't decide, it will become necessary for the State to retry the entire case . . . don't let us know that you are hung up in there; come to that firm decision that he is guilty. We need you to give us justice, we need you to tell us what we all know in this courtroom – that he's guilty. . ."

The above were among the final statements to the jury by the prosecutor in the case sought to be reviewed.

Earlier in his closing dissertation the prosecutor had leveled a few remarks at defense counsel and a State's witness who had testified adversely to the State's case regarding the heart and soul of Petitioner's case – that he had properly disbursed the funds. Among them were:

"But remember what really happened – Marsalek (the State's witness), number one, either doesn't know or isn't telling the whole story. . ."

"Either Andresen lied to him or they worked together in lying."

"Mr. Lamb (defense counsel) has been doing a good job defending Mr. Andresen; he's making all those objections like he's supposed to be doing; yelling and screaming . . . going to divert your attention . . ."

"There are a couple of things they [defense counsel] have said that are not proper and are not accurate, and they must be cleared up, because justice must be done in this case, and you're not going to be able to do justice unless you are put on the straight path, and that straight path has been made awfully crooked over the last hour and a half."

". . . this business about Marsalek's (the State's witness) opinion – Marsalek – Marsalek's opinion is just nothing but what Andresen told him; its just nothing other than what Andresen told him. It's the same flim-flam, and just read it back at you just like it came from Andresen. It's just like Andresen was on the stand, telling you through Marsalek's mouth – it's the same thing."

"It has been deliberately misrepresented to you that these assignments were mechanic's liens. [By defense counsel, when in fact they correctly were.] . . . it didn't happen, it isn't true. It isn't true . . . There's no mechanic's liens here — these are assignments."

"That's not a lien on the title, that's no mechanic's lien, that's an assignment . . . and in no way is it a mechanic's lien, and I cannot stress that to you in any more direct way. It's a . . . you have been misrepresented, you have been deliberately misled. [By defense counsel.] There is nothing whatsoever to do with a mechanic's lien in this case, not a thing – nothing."

"The facts have been distorted; have been distorted terribly, have been distorted desperately." (By defense counsel.)

"Mr. Andresen has been flim-flaming the witnesses on the stand – he flim-flammed Covert, he flim-flammed Norman Hecht, he flim-flammed F.O. Day, he flim-flammed Marsalek, now he's trying to flim-flam you. All this lying, cheating, lining his pockets while thumbing his nose at everybody – that's the truth of what happened, that's what it all boils down to. All this flim-flamming has been an attempt to cover up the facts, the truth and not let it come out . . . and you've got to open your eyes wide to get by all this desperate, desperate diversion." (By defense counsel and appellant, who did not testify.)

It was in this posture that petitioner's case went to the jury. They had previously been instructed by the Court

and no curative instruction was given following the prosecutor's statements.

Petitioner was convicted by the jury of all of the eight counts not abandoned by the prosecution. The Court of Special Appeals then reversed four of the counts. This leaves the Petitioner presently convicted of the four counts upon which review by this Honorable Court is sought.

ARGUMENT

I

AN ATTORNEY AT LAW, WHO IS A SOLE PRACTITIONER, MAY INVOKE HIS PRIVILEGE AGAINST SELF INCRIMINATION UNDER AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES, TO PREVENT THE INTRODUCTION OF HIS PERSONAL HANDWRITTEN NOTES AND MEMORANDA, BOOKS AND RECORDS, WHICH WERE SEIZED FROM HIS DESK AND FILES IN HIS PERSONAL OFFICE, UNDER A SEARCH WARRANT HELD TO BE OTHERWISE REASONABLE, INTO EVIDENCE AGAINST HIM AT HIS CRIMINAL TRIAL.

On this important point, petitioner's cause is ripe for review by this Honorable Court. It meets most of the criteria established by the Considerations Governing Review on Certiorari of *Rule 19* of this Court, *i.e.*:

(a) The state court has decided an important federal constitutional question which has not heretofore been determined by this Court; and has decided it in a way probably not in accord with applicable decisions of this Court on the same subject, but not precisely on the same point; and, in so doing has adopted the holding of a federal court of appeals wherein:

(b) A court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; and has decided an important federal constitutional question which has not been, but should be, settled by this Court; and has decided it in a way in conflict with applicable decisions of this Court on the same subject, but not precisely on the same point.

The above premise is true because the state courts have adopted, as being correct, the reasoning of *United States v. Blank, supra,* as stated in the Statement of the Case herein, in holding that the Fifth Amendment privilege does not attach to personal records simply because they were seized under a valid search warrant, because:

> "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant."

In so doing, the state courts have openly and directly rejected the holding of *Hill v. Philpott, supra,* (another United States Court of Appeals case recently cited with unanimous approval of this Court in *Bellis v. United States,* 417 U.S. 85, 87-8 (1974)). *United States v. Blank* and *Hill v. Philpott* are in direct conflict as to the reasoning used in the premise decided in petitioner's cause, and upon which review is requested here. *Hill v. Philpott* held that personal business records seized by an Internal Revenue agent could not be used without violation of the defendant's Fifth Amendment rights.

It is important to note that the State of Maryland does not contend, nor did the state courts take issue with the fact that the papers seized and admitted into evidence over objection in petitioner's case were personal papers of the type which would ordinarily be privileged and could not be used against him. Both the respondent and the state courts readily admit that, if the subject documents had been sought by subpoena, rather than seized, they would have been privileged. (A. 51; Memorandum and Opinion of trial court as quoted in Statement of the Case herein, pp. 8-9.) They, however, each conclude that, because the search and seizure of the papers was held to be reasonable, the Fifth Amendment protections therefore do not apply because petitioner "was not compelled to do anything". (A. 51-4)

Petitioner, initially must state that he does not agree with the reasoning of *Blank* that there is no element of compulsion present when a defendant's personal papers are seized. In petitioner's view, as well as the view of this Court he believes, there is a greater degree of compulsion exhibited by a forced taking of one's personal papers during a search and seizure than by directing production of those documents by use of a subpoena.

Such a holding is a complete divorce from the true meaning of compulsion or being compelled. Recently, in his concurring opinion in *Couch v. United States,* 409 U.S. 322 (1973), Mr. Justice Brennan observed:

> If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to

> take them in hand and personally present them to the Government agents. Where the Government takes private records from, for example, a safety deposit box against the will of the owner of the documents, the owner has been compelled, in my view to incriminate himself within the meaning of the Fifth Amendment.

Furthermore, the reasoning of *Blank*, relied on so strongly by the State courts, was somewhat "watered down" by its additional holdings in that instance that the papers seized "were not communicative in nature", were not "personal and private writings", and were "on their face instrumentalities" of a crime. This is the probable reason why certiorari was denied in that case by this Honorable Court. Such is concededly not true of petitioner's case!

Finally, it is submitted that the applicable previous decisions of this Court indicate that the holding of the *Blank* court and the state courts in this cause must be rejected and that of the *Hill v. Philpott* court upheld.

As recently as in *Bellis v. United States, supra*, Mr. Justice Marshall proclaimed for this Court that:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd v. United States*, 116 U.S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him

> of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635; *Wilson v. United States*, 221 U.S. 361, 377 (1911). The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd v. United States, supra; Couch v. United States*, 409 U.S. 322 (1973); *Hill v. Philpott*, 445 F.2d 144 (CA7), cert. denied, 404 U.S. 991 (1971); *Stuart v. United States*, 416 F.2d 459, 462 (CA5 1969). As the Court explained in *United States v. White, supra*, at 698, "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." See also *Curcio v. United States*, 354 U.S. 118, 125 (1957); *Couch v. United States, supra*, at 330-331. . . . We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought" -- an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication — and "proscribes state intrusion to extract self-condemnation," *Couch v. United States, supra*, at 327. See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

The above dissertation reflects the teaching of the great English case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), which were cherished by our statesmen when the Constitution was adopted. These teachings were first enunciated in *Boyd, supra*, then in *Gouled v. United States*, 255 U.S. 298 (1921), and again in *United States v. Lefkowitz*, 285 U.S. 452 (1932) wherein it was said that in *Entick v. Carrington:*

> Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help federal conviction even in cases of most atrocious crime . . .

In *Weeks v. United States*, 232 U.S. 383 (1914), it had been said:

> . . . as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, . . . is entitled to protection."

In *Warden v. Hayden*, 387 U.S. 294 (1967), the landmark case for seizure of "mere evidence" as opposed to fruits of crime, etc., which the state courts in petitioner's case reason as overruling *Gouled* as to the above cited protection as to private papers, dealt with articles of clothing, and in fact expressly eliminated personal papers from its holding, when the Court said at page 302-3:

> The items of clothing involved in this case are not "testimonial" or "communicative" in nature

> and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

The principles of *Boyd* were therefore not overruled by *Warden v. Hayden*, but in fact upheld!

Thus, when the *Hill v. Philpott* Court stated:

> The *Warden* decision thus eliminates any distinction as between items which may be considered "mere evidence" and those which may be "instrumentalities, fruits of crime, or contraband." In overruling *Gouled* as to its Fourth Amendment teachings, we do not believe that the Court intended to in any way diminish the Fifth Amendment characteristics which might attach to certain items of property such as personal books and records. Indeed, the Fifth Amendment holding of *Gouled* which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the *Warden* opinion . . .
>
> Significantly, the *Warden* Court immediately distinguished the nature of the evidence seized in that case from the books and papers involved in both *Boyd* and *Gouled.*

— they were professing the status of the law of the land in this regard, which remains so.

Additionally, Article 5, Section 5, *Annotated Code of Maryland*, also precluded the admission of the evidence seized under the search warrant in petitioner's trial for false pretenses, a misdeameanor.

Art. 5, Sec. 5, since repealed, was in full force and effect at the time of the search and seizure and at the time of Petitioner's trial. Subsection (a) thereof provides:

> No evidence in the trial of misdeameanors shall . . . be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Since the effect of the admission of the seized evidence was to compel Petitioner "to give evidence against himself" and since the statute prohibited the admission of same in no uncertain terms, his convictions should have been reversed by the Court of Special Appeals.

This premise was pointed out to the Court in Petitioner's appeal brief, argued before the Court and brought up again on motion for reargument, all to no avail since the Court of Special Appeals refused comment on it. In ignoring the cited statute the Court of Special Appeals has denied Petitioner his constitutional rights which also merits revicw by this Honorable Court.

II

THE SEARCH OF PETITIONER'S OFFICES WAS VIOLATIVE OF AMENDMENT IV TO THE CONSTITUTION OF THE UNITED STATES.

A. The search warrants were never formally introduced into evidence.

In *Bumper v. North Carolina*, 391 U.S. 543 (1968), this Court made the observation that if the State relied upon a search warrant to justify a search, but failed to produce it in evidence, "there is no way of knowing the conditions under which it was issued, or determining whether it was based upon probable cause" (footnote 15 at page 550). In Cornelius, *The Law of Search and Seizure*, 185, "Duty of prosecution to introduce search warrant, in evidence," (1926), it is stated:

> "A conviction cannot be sustained where a search warrant, under which the evidence has been obtained, is not introduced in evidence, where it appears from the evidence that the discovery and seizure * * * was attempted to be justified by the officer's possession of a search warrant the validity of which, though objected to and attacked, was not established by the introduction of the warrant itself, or by proof of its contents."

Admittedly, the warrants and applications were present at the suppression hearing, discussed and passed around; but the State failed to have them introduced or admitted into evidence. The Court of Special Appeals felt that because the warrants were forwarded by Court order to the Circuit Court for Frederick County "for the purpose of their introduction into the records" and the fact that they were physically present at the hearing and that the trial judge "admonished the State not to have witnesses read from the warrant because 'the warrant speaks for itself' ", their non-introduction and lack of admission into evidence was overcome. (A. 28-33)

The introduction and admission into evidence of warrants is a formality that cannot be dispensed with. To hold otherwise would dispense with the necessity to introduce *any* document into evidence where its existence and contents are intended to be proved or that in the alternative a proper foundation be established for the use of secondary evidence. Neither were done here.

B. Because of the descriptive terminology of the things to be seized used in the warrants, they became prohibited "general" warrants not "particularly describing the . . . things to be seized".

The terminology of the warrants in terms of describing the things to be seized is set out in full at page A. 38 of the Opinion of the Court of Special Appeals in the case sought to be reviewed. The Court felt that the warrants were "models of particularity". This is true, *up to a point.* When the language of the warrants left that point of demarcation of particularity, they became general warrants.

Initially, and throughout the lengthy descriptive phrase of the particular things to be seized, the warrant lists, in minute detail, every conceivable piece of writing and tangible evidence possible "showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses" "pertaining to sale, purchase, settlement and conveyance of Lot 13, Block T . . ." The list of papers and records sought could not possibly be more complete!

But then the prosecutor struck the fatal blow! He showed the true intent of the warrant and its description of things to be seized when he added the following phrase, which negated all of the previously set out particularity:

"together with other fruits, instrumentalities and evidence of crime at this time unknown."

The addition of this phrase had the same effect as amending a bill in the Legislature which prohibits sex discrimination by adding a phrase that it "does not apply to women". The phrase completely reverses and negates the meaning of the language and thereby authorized a prohibited "general rummage through all the materials".

This was not a "minor imprecision in draftsmanship", but a carefully conceived plan to search and seize hordes of material not pertaining in any way to Lot 13, Block T, which plan was in fact carried to fruition and upheld by the Court of Special Appeals.

The Court's Opinion holds that: "We read the questioned phrase as referring to 'other fruits, instrumentalities and evidence' of the crime of false pretenses with respect to Lot 13T." (A. 38) This holding is simply not reasonable. The addition of the phrase extended the warrant to include *any* evidence of *any* crime (not particular evidence of a particular crime) and therefore made the warrants "general". If the phrase referred to Lot 13T, why didn't it say so? Why was it added when the particularity as to 13T was so complete? Why did it allow seizure of evidence "of *crime at this time unknown*"? It is the answers to these questions that should be resolved by review.

C. Because of the nature of the crime of false pretenses, it was impossible for the judge who issued the warrants to have made the finding, which he did, that probable cause was demonstrated that a crime "is being committed" on the premises.

The search warrants were issued on October 30, 1972, based on contemporaneous affidavits. The very nature of the crime of false pretenses, which was allegedly established in the affidavits as having been committed in July, 1972, is that there was "a false representation of a past or existing fact". *Polisher v. State,* 11 Md. App. 555 (1971). Therefore the issuing judge could hardly have found that a crime was currently "being committed" over three months later, which he did. The Court of Special Appeals, relying on Art. 27, Sec. 551, *Annotated Code of Maryland,* wherein it is stated that a search warrant may be issued upon a finding that probable cause exists that "any property subject to seizure under the criminal laws of this state is situated" on the premises, made the warrant acceptable. The Court then goes on to read the *Fourth Amendment* as part of the "Criminal laws of this State". (A. 37) Even if so, this finding completely ignores the fact that the affidavit in support of the warrant alleged, and the issuing judge found by incorporating the affidavit into the warrant, "that there is probable cause to believe that the laws relating to false pretenses . . . are being violated upon the . . . premises." This was an impossibility.

D. The Court of Special Appeals in upholding the admission of certain items into evidence which were obtained by search and seizure violated the principals and purposes annunicated by this Court in *Warden v. Hayden,* 387 U.S. 294 (1967).

The Court of Special Appeals, in the case sought to be reviewed, first, as above stated, held that the subject warrants particularly described the things to be seized as "referring to 'other . . . evidence' of the crime of false pretenses with respect to Lot 13T". (A. 34-5) Then the Court goes on to hold:

> Several other items seized, although not relating to Lot 13T specifically, showed a general pattern of operation on the part of the appellant with respect to unreleased deeds of trust on other properties in Potomac Woods and, therefore, negated any suggestion of mere mistake and lack of knowledge on his part when it came to his false representations as to Lot 13T. Because of their bearing on the critical question of their *mens rea,* we hold that they too were seizable evidence under the warrants. (A. 47).

What this holding does is to ignore the standard set forth in *Warden v. Hayden, supra,* that:

> Thus in the case of 'mere evidence', probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. *In so doing, consideration of police purposes will be required.* (Emphasis supplied)

In the instant case, the papers "not relating to Lot 13T" which were seized, were not used by the prosecutor in an attempt to establish *mens rea* as to false pretenses. Instead the prosecutor, after examining the documents for over two weeks, obtained the misappropriation indictments based upon them.

In so doing, and consolidating the false pretense counts with the misappropriation counts for trial, he made the documents relevant in violation of the principles stated in *Huber v. State,* 2 Md. App. 245 (1967). Had it not been for the additional indictments and the consolidation, the additional papers could never have been admitted because they were irrelevant to the false pretense charges. This is clear, because the lower court, despite repeated attempts by the prosecutor throughout the entire trial to introduce other seized evidence of other acts by the petitioner in his attempt to establish *mens rea,* refused its admission. The court properly refused because as the court ruled, the evidence as to the prior acts was clearly inadmissable under the principles of *McEwan v. State,* 194 Md. 494 (1950), due to the fact that the State *never* established a *prima facie* case of guilt in the estimation of the trial judge.

Therefore, an examination of the prosecutor's motives, as dictated by this Court in *Warden v. Hayden* reveals that the evidence seized as to the misappropriation counts would also have been inadmissable had it not been for the additional indictments. It should also be noted that these papers were among thousands of others seized. This Court's consideration of the prosecutor's motives by review should result in a determination of lack of probable cause for the seizure of the papers.

E. The two-prong test of credibility – reliability and trustworthiness of the non-swearing informants was not satisfied.

There were no allegations of direct observation or personal knowledge as to the things sought in the alleged affidavits in support of the search warrants as to whether or not they were present on the premises. Therefore the issuing Judge was forced to rely entirely on information received second, third or fourth hand as hearsay in his determination of probable cause in the warrants. Therefore it was necessary to present reasons why the information received was reliable in order for the magistrate to determine the truthfulness of the information. This is necessary in order to satisfy the two-prong test of credibility-reliability and trustworthiness as enunciated in *Aguilar v. Texas,* 378 U.S. 108 (1964).

The information received in the instant case was not received from "disinterested witnesses", "disinterested civilian sources" or "victims of crime" as opined by the Court of Special Appeals. (A. 43-4) If Young was to be considered as such, it must be noted that the information supplied by him supported no factual basis for the commission of a crime. His information, if in fact he felt something was wrong, was at least fifth or sixth hand. The only possible information that could have led to a belief that a crime had been committed originated with Hecht and, by a stretch of the imagination, from State National Bank. Hecht (and for that matter Covert of State National) were not disinterested witnesses or victims, they were actually deeply embroiled in a civil controversy with appellant regarding the same factual situation, of which the affiants had actual knowledge as was shown at the hearing on the

Motion to Suppress and at the time of petitioner's trial, and which was not disclosed to the issuing Judge as was necessary.

III

THE PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE HE DID NOT RECEIVE A FAIR TRIAL DUE TO THE CUMULATIVE EFFECT OF THE ACTIONS OF THE PROSECUTION AND THE STATE COURTS.

Review is sought here to correct a denial of due process because the closing remarks of the prosecutor, some of which were pointed out in the Statement of the Case herein and went uncorrected over objection, were so innocuous, opinionated and prejudicial, that, when considered together with the other prejudice to the accused, evident at the state trial and appellate levels, amounted to the denial of a fair trial.

The closing argument was the crowning blow to a long series of prejudicial errors and denials which were compounded on appeal, so that when the totality of the effect is considered in light of the closing argument, petitioner was denied due process of law.

A recitation of some of the problems encountered by petitioner, to which he objected at every stage of his trial and appeal, and was denied relief or overruled follow:

1. The prejudicial pre-trial publicity requiring removal of his trial from his home county and peers. (A. 1)

2. The initial "overcharge" of the indictments, denial of a request for severance, and abandonment of most of the charges without proof. (A. 69)

3. Denial of his Motion for Continuance to await appellate decisions on related cases (which had been advanced for hearing), to allow his counsel to prepare an affirmative defense, and to allow an accountant to complete an audit of his escrow accounts so he could testify. (A. 68)

4. Denial of a Reservation of Question for Court En Banc as to the Fifth Amendment objection raised, a guaranteed right under the *Maryland Constitution.* (A. 73-5)

5. The "general" and "over-search" and "over-seizure" as previously discussed.

6. Prejudicial instructions and lack of instruction after request, including a reference to the petitioner's refusal to testify. (A. 57-63)

7. The side deal with Petitioner's client, Clark, which was not disclosed until the time of trial. A written immunity agreement had been in existence ever since appellant was charged, yet it was not revealed even after request in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). Petitioner conferred with Clark frequently without being given the necessary warnings (*Miranda v. Arizona,* 384 U.S. 436 [1966]). The agreement was finally sprung on Petitioner at trial. (A. 63-6)

8. The evasive and uncooperative tactics of the prosecution in response to discovery orders. This included a tardy response to a granted bill of particulars ten minutes before trial comprised of evasive and incomplete

answers and a list of 54 prospective witnesses with lack of proper addresses. (A. 86-7)

9. Denial of his Motion for New Trial after a favorable ruling on a related case had seriously contradicted the state's evidence, witnesses and argument and the court's jury instructions. (A. 66-7, 78-81)

10. His being sentenced under criticism for maintaining his innocence when he did not testify at the trial. (A. 92-4)

11. The trial court applied an incorrect standard in denying his Motion for Acquittal, looking at the evidence in the light most favorable to the State rather than a "reasonable doubt" standard. (A. 88-9)

12. The Court's refusal to suppress the wrongfully seized evidence and its refusal to reconsider as previously discussed.

13. Numerous adverse rulings on evidence. (A. 69-73)

14. The refusal by the Court of Special Appeals to reply to many of petitioner's major contentions, especially as to lack of jurisdiction, and its misapplication of past decisions of the case, even after a Motion for Reargument had been filed pointing these important omissions and errors out. (A. 89)

15. The refusal of the Court of Appeals to state its reasons for denial of certiorari after a request for same when Sec. 12-203, Courts and Judicial Proceedings Vol., *Annotated Code of Maryland*, requires it. (A. 93)

In light of the extent of the prosecutor's efforts to mislead the jury and misrepresent the evidence and the

apparent comment on the failure of the accused to testify, it is contended that the error reached such proportion that the federal standard would apply so that there would be a violation of due process under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Miller v. Pate*, 386 U.S. 1 (1967). In such a case, it would be the burden of the prosecutor to show the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967), which it never attempted to do.

CONCLUSION

For the foregoing reasons, especially as to the Fifth Amendment contentions, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER C. ANDRESEN
3514 Flyers Mill Road
Kensington, Md. 20795
Petitioner

Supreme Court, U. S.
FILED
JUN 23 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI To the Court of Special Appeals of Maryland

PETER C. ANDRESEN
Petitioner
3514 Flyers Mill Road
Kensington, Maryland 20795

ABB DUPLICATORS, INC.—1722 Eye Street, N.W.—Washington, D.C.—298-6827

INDEX

	Page
Opinion of the Court of Special Appeals of Maryland	A. 1
Letter from the Clerk of the Court of Special Appeals of Maryland noting denial of Motion for Reargument and Modification of Opinion	A. 89
Mandate of the Court of Special Appeals of Maryland	A. 90
Order of Court of Appeals of Maryland denying Petition for Certiorari to the Court of Special Appeals of Maryland	A. 92
Letter from the Clerk of the Court of Appeals of Maryland noting denial of Motions for Statement of Reasons for Denial of Writ of Certiorari to Court of Special Appeals and for Reconsideration of Petition for Writ of Certiorari to Court of Special Appeals	A. 93

APPENDIX

PETER C. ANDRESEN *v.* STATE OF MARYLAND

[No. 152, September Term, 1974.]

Decided January 10, 1975.

The cause was argued before MORTON, MOYLAN and POWERS, JJ.

Philip J. Hirschkop, Peter C. Andresen and *Frank W. Marsalek* for appellant.

Gilbert Rosenthal, Assistant Attorney General, with whom were *Francis B. Burch, Attorney General, Andrew L. Sonner, State's Attorney for Montgomery County, Jeffrey Russell Werner, Assistant State's Attorney for Montgomery County,* and *Robert S. Rothenhoefer, State's Attorney for Frederick County,* on the brief, for appellee.

MOYLAN, J., delivered the opinion of the Court.

The appellant, Peter C. Andresen, is an attorney at law in Montgomery County specializing in the handling of real estate settlements. On November 1, 1972, an information was filed against him charging four counts of false pretenses. On November 16, 1972, he was indicted by the Montgomery County Grand Jury on 17 additional charges. The indictment and the information were consolidated for trial.

The *Washington Post* had run a series of investigative reports in the early part of 1972 exposing various "kick-back" schemes, unnecessary charges to buyers and unethical relationships between lawyers, real estate brokers, title companies and developers that combined to plague the unsuspecting layman at real estate settlements. The series spurred bar association action in both the Maryland and Virginia suburbs of Washington. The Bi-County Fraud Unit,

under the joint auspices of the State's Attorneys Offices of Montgomery County and Prince George's County, launched a massive investigation into such practices. Because of extensive publicity arising out of all of these activities, the appellant's case was removed, upon his motion, to Frederick County for trial.

After a trial before a Frederick County jury, presided over by Judge Samuel W. Barrick, which lasted a week and one-half, and produced (with its pretrial motions) over 1500 pages of testimony, the appellant was convicted of three counts of fraudulent misappropriation by a fiduciary in contravention of Art. 27, § 132, and of five counts of false pretenses. He received eight concurrent two-year sentences.

Upon this appeal, the appellant lays down a sweeping barrage of 28 assignments of error:

(1) That the counts in the indictment charging fraudulent misappropriation by a fiduciary failed to charge an offense;

(2) That the evidence was not legally sufficient to sustain the convictions for fraudulent misappropriation by a fiduciary;

(3) That the counts in both the indictment and the bill of information charging false pretenses failed to charge an offense;

(4) That the evidence was not legally sufficient to sustain the convictions for false pretenses;

(5) That certain physical evidence should have been suppressed because the search warrants were never admitted into evidence;

(6) That certain physical evidence should have been suppressed because the warrants were "general" and violated the particularity requirement;

(7) That certain physical evidence should have been suppressed because the Plain View Doctrine should not have been applied;

(8) That certain physical evidence should have been suppressed because there was no probable cause for the issuance of the warrants;

(9) That certain physical evidence should have been suppressed because the so-called "nexus" doctrine of *Warden v. Hayden* was misapplied;

(10) That certain physical evidence should have been suppressed because its seizure violated his Fifth Amendment right against compulsory self-incrimination;

(11) That the prosecutor's remarks in closing argument and in rebuttal argument were so prejudicial as to deny him a fair and impartial trial;

(12) That nineteen separate errors (to be more fully discussed hereinafter) were made in the course of the court's instructions to the jury;

(13) That the testimony of an alleged accomplice, Melvin L. Clark, lacked corroboration;

(14) That the court erred in admitting the testimony of Melvin L. Clark because his testimony was obtained by an "illegal agreement";

(15) That the State knowingly used the prejured testimony of a witness, Norman Hecht;

(16) That the trial judge erred in not granting the appellant's motion for a continuance, thereby denying him both his right to a fair trial and to effective assistance of counsel;

(17) That the trial judge abused his discretion in denying the appellant's motion for a severance;

(18) That error was committed when an irrelevant transaction with Antonelli and Caniglia was admitted into evidence;

(19) That the admission of the testimony of the witness Carl Zentz amounted to reversible error;

(20) That the motions for judgment of acquittal should have been granted because of the "best evidence rule" and because of the lack of expert testimony;

(21) That the appellant was erroneously denied his reservation of certain questions for the court en banc;

(22) That the admission into evidence of portions of the testimony of John C. Connally was reversible error;

(23) That the jury was coerced into reaching its verdict;

(24) That the appellant was denied genuine and effective assistance of counsel;

(25) That the court erred in denying the appellant's motions for judgment of acquittal;

(26) That the court abused its discretion in denying the motion for a new trial;

(27) That the sentence should be vacated; and

(28) That the misconduct of the prosecutor required reversal of the convictions.

1. Adequacy of Fraudulent Misappropriation Charges

We have no difficulty in upholding the facial sufficiency of the charges of fraudulent misappropriation by a fiduciary. Art. 27, § 132, provides, in pertinent part:

> "If any ... trustee ... or any other fiduciary shall fraudulently and wilfully appropriate to any use and purpose not in the due and lawful execution of his trust, any money or any other thing of value which may come into his hands as such ... trustee ... or in any other fiduciary capacity ... he shall be deemed guilty of embezzlement ...."

The three counts charging fraudulent misappropriation, varying from each other only as to date and name of victim, each contained the following critical predicate clause:

> "... did unlawfully, while acting in the capacity of a trustee and fiduciary, embezzle and fraudulently and wilfully appropriate to a use and purpose not in the due and lawful execution of his trust for and on behalf of Seth L. Warfield and Ruey Warfield, the sum of two thousand dollars ($2,000.00) current money, of the value of two thousand dollars ($2,000.00) current money, of the goods, chattels, monies and property of Seth L. Warfield and Ruey Warfield, in violation of Article 27, Section 132 of the Annotated Code of Maryland ...."

Shorn of convoluted verbiage and "scatter-shot" case citation, the kernel of this contention stands naked as a bald allegation. The appellant does successfully build an appellate launching pad, but then fails to get off the pad. In neither pretrial motions nor the trial upon the merits did the appellant attack these counts in terms of their facial adequacy. He points out correctly, however, that where the issue is the alleged failure of an indictment to charge an offense, the question is of jurisdictional dimension and is subject to appellate review even though not raised below. *Phenious v. State*, 11 Md. App. 385, 274 A. 2d 658. Ironically, having established his right to raise the contention for the first time at the appellate level, the appellant then fails further to contend. In any event, it is clear that the counts were drawn precisely in the language of § 132 and did, therefore, adequately charge the relevant offenses.

The appellant veers off on another tack, not dealing with the facial adequacy of the charges as such but seizing upon their employment of the verb "embezzle." With a brace of *non sequiturs*, he reasons that the use of the verb "embezzle" in charging violations of § 132 transforms the offenses into more classic embezzlements under § 129, and that his acquittal of companion counts drawn under § 129 operates as *res judicata*, barring convictions upon the counts now under review. He is guilty of both bad logic and bad law.

With respect to each of three sets of victims, the appellant was charged, with the all-inclusive caution typically shown by thorough charging documents, with (1) larceny after trust, (2) garden-variety embezzlement and (3) fraudulent misappropriation by a fiduciary. The trial judge instructed the jury as to the elements of these at-times complementary and at-times overlapping offenses. He advised them that although the appellant might be found guilty of one of these offenses with respect to each transaction, he should not be found guilty of two or three related offenses arising out of a single incident. He left it to the jury to pick the offense most applicable to the facts as found by them. When, therefore, the jury returned verdicts of guilty on the three counts charging fraudulent misappropriation by a fiduciary, they

appropriately refrained from judicial "overkill" by remaining silent as to the charges of larceny after trust and classic embezzlement. Out of our law aimed at preventing double jeopardy emerges the principle that the silence of a jury as to a particular count is the equivalent of a verdict of not guilty as to that count. That very necessary fiction, salutary enough in guarding against double jeopardy, cannot, however, by a leap of logic, be deemed to be an explicit and positive verdict operating as a *res judicata* acquittal on a companion charge. The logic, sound enough for one purpose, has no applicability to the other purpose. A technical acquittal, based upon a jury's restraint in not piling on multiple convictions or alternatively upon the subsuming of lesser-included charges into a greater, does not carry with it the logical implications of an affirmative acquittal upon the merits. When compassion has tempered logic for the obvious benefit of a defendant, the defendant may not then with good grace argue from the result as if that logic had operated ruthlessly in a vacuum. To escape double punishment is not to be vindicated.

Even if the appellant's logic were valid, however, the law would still frustrate his argument. Even if the acquittals on the embezzlement counts could be held to be based upon affirmative findings that the elements of embezzlement had not been established by the State and that, by necessary implication, the absence of proof of such elements would preclude convictions under § 132, the law simply does not demand consistency between the various verdicts rendered by a jury. The applicable law of the Court of Appeals, of the Supreme Court and of the leading authorities throughout the common law world was summed up by us in *Mason v. State*, 2 Md. App. 768, 771, 238 A. 2d 138:

> "In *Ledbetter v. State*, 224 Md. 271, it was held that a conviction on one count may stand even in the face of an inconsistent acquittal on another count. To the same effect, see *Williams v. State*, 204 Md. 55 and *Leet v. State*, 203 Md. 285. See also *Dunn v. United States*, 284 U. S. 390, 393, where

> Mr. Justice Holmes held that consistency in the verdict is not necessary since the verdict may have been the result of compromise or a mistake on the part of a jury; and *Steckler v. United States*, 7 F. 2d 59 (2d Cir.), where Judge Learned Hand observed, at page 60, that 'the most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.' "

We perceive no frailty, of omission or commission, in the counts charging fraudulent misappropriation by a fiduciary.

2. Legal Sufficiency of the Evidence Fraudulent Misappropriation Charges

The gist of the three fraudulent-misappropriation-by-a-fiduciary charges is that the appellant, as settlement attorney, took money from three sets of home purchasers with the understanding that he was to deliver to them titles free and clear of all encumbrances and that he misappropriated the purchase money to other purposes.

Melvin Clark was the owner of the Clark-King Construction Company (hereinafter Clark-King). In the mid-1960's, Clark-King began using the appellant as its real estate settlement attorney. He soon became the exclusive attorney for its numerous real estate settlements. The appellant, moreover, did the title search on every large tract of land that Clark-King bought for development, as well as every lesser-included title search for each lot in those developments as the lot came up for sale. The appellant handled other work as well for Clark-King, preparing virtually all of its legal papers in connection with its real estate transactions, handling the settlement of its construction loans which permitted Clark-King to build new homes, and preparing the deeds of trust given as security for those loans.

With the advent of the tight-money market in 1967,

Clark-King began experiencing financial difficulty. It had to find a way to keep up payments to its contractors in order to keep them working on putting up new homes in the developments. Even as these difficulties were being experienced, fewer new homes were being sold to provide money for such purposes. Clark-King found itself sometimes unable to pay off all debts on a new home in order to give a free and clear title to the home buyer. The appellant and Clark-King reached an agreement to stave off disaster, whereby the appellant would maintain "a running account," ostensibly laying out money for Clark-King so that a free and clear title could be delivered. Mel Clark testified that he thought this was a lending arrangement, under which the appellant would be repaid once sales improved. Clark thought that prior debts secured by deeds of trust on the various lots were being paid off so that good titles were being delivered at the time of settlement. These deeds of trust and other encumbrances were, indeed, listed on the seller's settlement sheet. The evidence revealed, however, that these encumbrances were frequently not being released.

The Clark-King development that concerns us in this case was an area known as Potomac Woods, Section 10. That section was divided into approximately 20 lots, three of which became the subjects of the fraudulent misappropriation charges now under review.

The first pertinent encumbrance was a deed of trust to the F. O. Day Company. On September 30, 1969, the F. O. Day Company loaned Clark-King $37,000 and received in return a $37,000 note. As security for that note, a deed of trust was executed on December 13, 1969, from Clark-King to F. O. Day Company on 16 lots in the Potomac Woods subdivision, including the three key lots in this case. Provisions were made for the release of any of these particular 16 lots, as that lot would come up for sale, by the payment of $2,000 on the note with the appropriate designation that the payment was being earmarked for the partial release of a particular lot. When Mel Clark personally made payment to the F. O. Day Company without any direction that the payment be applied to one of the lots in Potomac Woods, that payment

went toward the reduction of a more general $15,000 debt owed by Clark-King to the F. O. Day Company. The payments in the precise amount of $2,000 and the release of the deed of trust on particular lots almost always came from the appellant directly, in anticipation of a particular settlement, to the F. O. Day Company. The appellant, in fact, was the trustee for this particular deed of trust.

Mr. and Mrs. Richard Pollitt moved from New York City to Montgomery County in the spring of 1970. They signed a contract to purchase the property at 1976 Lancashire Drive, which was Lot 12, Block S, of the Potomac Woods subdivision (hereinafter the Pollitt lot). The contract drawn up by the real estate company designated the appellant as the settlement attorney. Mr. Pollitt indicated to the real estate company that he wanted his own attorneys, Bell and Bell, to handle the settlement. He was told by the real estate agent that Clark-King insisted upon having all of its settlements done by the appellant. The Pollitts then acquiesced in that arrangement. Physically present at the settlement was George F. Paxton, an attorney who worked for the appellant. The settlement took place on May 15, 1970. Mr. Pollitt paid $225 for a title search, which was handled by the appellant's office. Mr. Pollitt paid $175.23 for a title insurance policy, which was procured through the appellant. Mr. Pollitt received assurances that, aside from the purchase money mortgage he was then executing to the Equitable Life Insurance Company, "there would be no clouds on the title."

Among the settlement documents was a Notice to Buyer and Seller as to Evidence of Releases to be Furnished Them and identifying the Pollitt lot as the subject property. That notice, required by Article 21, § 142, of the Annotated Code of Maryland, provided:

> "In connection with the settlement of the sale and conveyance of title in this transaction, notice is hereby given:
>
> One. That you are entitled to be furnished by Peter C. Andresen, the settlement attorney, evidence of recorded releases of mortgages or deeds of trust to

be obtained with all or part of the funds to be disbursed within thirty days from the date of delivery of the deed conveying title to captioned property.

Two. That if the recording of the releases will be delayed beyond the thirty-day period, a letter explaining the delay shall be mailed to you by or through this law firm within the thirty-day period.

Three. That the procedure of mailing a letter of explanation each thirty days is necessary until the required evidence of recorded releases is furnished to you.

Four. That if the evidence of a recorded release is not furnished you within the required period of time, you or either of you, or an organized Bar Association of the State of Maryland may petition a Court of Equity to accomplish this purpose.

Five. That in the event that the funds are properly disbursed by said settlement attorney within five days from the date of delivery of the deed, the law does not require that you be furnished evidence of recorded releases unless you specifically request that we do so.

This notice is given to you pursuant to Section 42, Article 21 of the Annotated Code of Maryland. You are required to acknowledge that this notice was given you prior to the execution of the deed conveying title to the property."

There was an additional clause at the bottom of the notice which provided:

> "We hereby waive being furnished evidence of recorded releases, having been assured by said settlement attorney that all funds in this transaction will have been disbursed within five days from the date of delivery of the deed."

The Assistant Treasurer of Equitable Life testified that she approved the loan of $39,000 for the Pollitts to purchase

their new home. She pointed out that company policy would have precluded the loan unless it was to be a "first trust loan." Following the normal procedure in such matters, Equitable Life issued explicit written instructions to the appellant, as settlement attorney, to apply the loan funds to that settlement only upon the condition that any prior encumbrances be released so that Equitable Life would hold "a valid first lien against the first property without exception." The appellant was instructed to provide title insurance for the benefit of Equitable Life. Equitable Life received, through the appellant, a title insurance policy from the Title Insurance Company of Minnesota. The title insurance policy received by Equitable Life and the copy of the buyer's settlement sheet received by Equitable Life made no mention of the deed of trust to the F. O. Day Company or, indeed, of any other prior lien.

The Pollitts, and Equitable Life, only learned of the deed of trust to the F. O. Day Company in June of 1972, when the Pollitts had agreed to resell the property and were preparing for settlement. Their then attorney, David C. Galfond, searched the title and discovered the unsuspected encumbrance.

Seth and Ruey Warfield encountered a similar experience. On July 1, 1970, they purchased the property at 1890 Milborough Drive, which was Lot 25, Block R, of the Potomac Woods subdivision (hereinafter the Warfield lot). They were advised by the real estate agent that the appellant "was handling all settlements for that area." Although they were told that they could bring their own attorney to the settlement, they were further "advised that we could but that it was an unnecessary expense." They decided to rely exclusively upon the appellant. The appellant was not physically present at the settlement but was again represented by his associate, George Paxton. The Warfields paid $55 to the appellant as a settlement charge, $225 to the appellant to examine the title and $90 to the appellant to procure title insurance. They also signed, at the suggestion of Mr. Paxton, the waiver of notice, "having been assured by said settlement attorney that all funds from this transaction

will have been disbursed within five days of delivery of the deed." They were told that the notice was "just another formality." The title search, the settlement sheet and the title insurance policy indicated that there were no encumbrances upon the property other than the purchase money mortgage which they arranged with Equitable Life. The Associate Treasurer of Equitable Life testified that they received the same assurances from the appellant and issued the same directions to the appellant with respect to the Warfield lot as they had received and issued with respect to the Pollitt lot. The Warfields were oblivious to the F. O. Day Company deed of trust until June, 1972, when they were alerted to the possibility of trouble by their neighbors, the Pollitts. They then obtained their own attorney to investigate the condition of their title.

Since the appellant was not physically present at the settlements involving the Pollitt lot and the Warfield lot, a word is in order as to what the testimony revealed about the role of his surrogate, George F. Paxton. Paxton was, during the summer of 1970, a two-year graduate of law school, who had been working in the appellant's office since April, 1970. His "main responsibility was to handle law suits that came into the office" and, as the trial man, he "did very little with the real estate end of the practice." On occasions, however, when the appellant "was called out of town or wished to be away on vacation or had another suit or something like that," Paxton would physically preside over the settlements. He explained that he had no role in the preparation of any of the settlement documents (that task, according to him, was always handled directly by the appellant or by one of the secretaries working directly under the appellant), but that he could go through the pro forma procedures of a settlement, seeing to it that the deeds were appropriately signed and delivered and the checks were made out in amounts dictated by the settlement sheets and handed over to the appropriate parties. In terms of the substance of the settlements, his role was completely neutral.

In terms of evidence to negate ignorance or mistake on the part of the appellant with respect to the Pollitt settlement

and the Warfield settlement, the testimony of Mel Clark was significant. He related that the settlements with him (as seller) were subsequent to and apart from the settlements with the buyers. The appellant sat down personally with Clark to go over both settlements. Initially, a tentative settlement sheet was prepared for the seller, listing the amount of money coming in from the sale and then listing the various debts owed and encumbrances to be released. In these two instances, the liabilities significantly outweighed the assets. As a result, the appellant prepared amended settlement sheets for the seller, reducing the list of liabilities so that they could be handled or nearly handled with the available assets. Among the liabilities which were given priority and which, therefore, remained on the amended settlement sheets were payments to various suppliers and contractors (*e.g.*, Standard Supply in Gaithersburg for $1,500; an air conditioner contractor for $1,000; the Maloney Concrete Company for $1,000; a lumber dealer for $2,000). In both instances, payments to the F. O. Day Company in the amount of $2,000 on each of the lots for the release of the deeds of trust for the Pollitt lot and the Warfield lot were marked "payment deferred." Clark testified that it was his understanding that the appellant would pay the $2,000 in each case to secure the appropriate release in order to give good title and would then reimburse himself from the proceeds of the next settlement he handled for Clark-King.

The pattern repeated itself, with minor variations, when Robert and Joyce Holtzclaw purchased 1887 Middleborough Drive, which was Lot 7, Block T, of the Potomac Woods subdivision (hereinafter the Holtzclaw lot) on July 10, 1970. The appellant was the settlement attorney because, according to Mr. Holtzclaw, "it was the recommendation of the realty firm." The appellant personally conducted that particular settlement. Mr. and Mrs. Holtzclaw signed a waiver of notice of "recorded releases, having been assured by said settlement attorney that all funds from this transaction will have been disbursed within five days from the date of delivery of the deed." That waiver form was turned over to the appellant. The check for the purchase

money was delivered to the appellant. The appellant was paid $220 for a title search and was paid $8.50 for a title insurance policy.

In order to purchase their property in Potomac Woods, the Holtzclaws borrowed $38,000, secured by a mortgage, from The Enterprise Federal Savings and Loan Association. James Spellman, the Assistant Secretary-Treasurer of Enterprise, testified that he instructed the appellant, as settlement attorney, in writing, "You are instructed to record the Deed of Trust and use our check when you are in a position to report the title to Lot 7 Block T 'Potomac Woods', ... good according to records in fee simple, in Robert E. Holtzclaw and Joyce Lynn Holtzclaw, his wife, as Tenants by the Entirety, subject (only) to the enclosed Deed of Trust, which is to be a first lien against said property." He subsequently received from the appellant a copy of the Settlement Statement for Seller, which showed Enterprise to have a first deed of trust. The Settlement Statement for Buyer, given to the Holtzclaws, showed the mortgage to Enterprise as the only encumbrance upon the property.

As the Holtzclaws discovered two years later, their property had been encumbered by not one, but three, prior deeds of trust. The Holtzclaw lot, as with the Pollitt lot and the Warfield lot, was part of an unreleased deed of trust from Clark-King to the F. O. Day Company. As with the other lots, a payment of $2,000 would have been required to obtain a partial release from the F. O. Day Company, effecting a clear title to the Holtzclaws in Lot 7T, at least with respect to the F. O. Day Company. That $2,000 was not paid by the appellant, and the release was not obtained. The Holtzclaw lot was also encumbered by a second deed of trust from Clark-King to the State National Bank of Bethesda and by a third deed of trust from Clark-King to Arthur Dale Lumsden. As with the F. O. Day Company deed of trust, the deeds of trust to both the State National Bank and Arthur Dale Lumsden were for a number of lots in the Potomac Woods subdivision. As lots were sold, a partial release for a particular lot was to be obtained from the State National Bank for $1,000 per lot and from Arthur Dale Lumsden for

$1,333 per lot. After the Holtzclaw settlement, no payments were made to either the State National Bank or to Arthur Dale Lumsden, and the releases were not obtained.

A release for the Holtzclaw lot was obtained from the Lumsden trust, approximately one year after the settlement, on July 27, 1971. The release of the Holtzclaw lot from the State National Bank trust and the releases of all three lots from the F. O. Day Company trust were only obtained in the summer of 1972, after the Pollitts had independently discovered the unsuspected encumbrance upon their lot and after the general investigation of the appellant's settlement activities was in full swing. The payment was made to the State National Bank trust and the release for the Holtzclaw lot was obtained on October 3, 1972.

The appellant makes the factually unsupported claim that he may have promptly paid off the various deeds of trust, the fact of payment being legally significant in terms of procuring clear title, and have simply neglected to record the releases, at most a formality. That arguable hypothetical is squarely belied by the testimony of Peter Hitchen, the Treasurer for the F. O. Day Company. Hitchen described both the record keeping and the arrangements for payment and releases entered into by the appellant and Clark-King, on the one hand, and the F. O. Day Company, on the other hand. He described how payments from the appellant would always be in precise multiples of $2,000 and would specify precisely the lot or lots to be released by such payment. He testified that payment was received and the release was given for the Pollitt lot on June 19, 1972. Payment was received and a release was given on the Warfield lot on July 7, 1972. Payment was received and a release was given on the Holtzclaw lot on July 27, 1972. On September 26, 1972, Hitchen showed to the appellant the records of the F. O. Day Company recording when payments had been received and when releases were given on all of the various lots in the Potomac Woods Subdivision, which collectively guaranteed the $37,000 note. After reviewing the records, the appellant objected only to the failure to credit him for $120 of interest

on one of the loans, not here relevant. In terms of the knowledge and attitude of the appellant, several exchanges between him and Hitchen are significant. When the appellant arrived to pay the $2,000 to obtain the release on the Holtzclaw lot, Hitchen greeted him with, "It looks to me as though you've been playing the old escrow game." The appellant said nothing in reply. Later in the same conversation, Hitchen "accused him of being a crook" and the appellant again said nothing in reply.

Even within the limited confines of this second of 28 contentions, the attack upon the legal sufficiency of the evidence is diffused. The appellant claims that the State failed to establish venue in Montgomery County, upon the strained theory that the situs of the fraudulent misappropriations was the undesignated spot where the escrow account was kept and not the place where the settlements occurred. Without attributing even arguable merit to the claim, we properly rely upon the fact that this issue was not raised at the trial and was not ruled upon by the trial judge. Accordingly, the point has not properly been preserved for appellate review. Maryland Rule 1085. And see *Bailey v. State*, 16 Md. App. 83, 294 A. 2d 123; Maryland Rule 725 b.

The appellant makes the additional claim that the State has not shown him to be a "trustee ... or any other fiduciary" within the contemplation of § 132. We cannot agree. *Black's Law Dictionary* (4th Ed., 1951), defines "Fiduciary Capacity" as follows:

> "One is said to act in a 'fiduciary capacity' or to receive money or contract a debt in a 'fiduciary capacity,' when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but includes also such

> offices or relations as those of an *attorney at law*, a guardian, executor, or broker, a director of a corporation, and a public officer." (Emphasis supplied.)

The Maryland case law is in complete accord. In *Gaggers v. Gibson*, 180 Md. 609, 26 A. 2d 395, the Court of Appeals said, at 180 Md. 613:

> "[A] fiduciary relation exists in every case 'in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal'."

See also *Gerson v. Gerson*, 179 Md. 171, 177, 20 A. 2d 567, and *Chase v. Gray*, 134 Md. 619, 107 A. 537. In *Anderson v. Watson*, 141 Md. 217, 118 A. 569, the Court of Appeals said, at 141 Md. 234:

> "A 'fiduciary' or 'confidential' relation, when used in the same connection, exists 'in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. The rule embraces both technical fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another; the origin of the confidence reposed is immaterial'."

The language of § 132 indicates to us a clear legislative intent to extend the proscription of the embezzlement laws to those who breach a fiduciary trust as above defined. In *Doxen v. State*, 151 Md. 118, 134 A. 166, the Court of Appeals affirmed the conviction, for classic embezzlement, of an attorney who received money from the purchaser of a property for the purpose of paying off an existing mortgage and then failed to pay it off. The Court approved a comment by the trial judge that indicated that an attorney, in

handling such property arrangements, might simultaneously be the agent of both the mortgagor and the mortgagee. Generally speaking, it is clear that an attorney does come within the proscriptive coverage of the embezzlement law under § 129. *Cooke v. State*, 9 Md. App. 303, 263 A. 2d 620.

We hold that the evidence in this case sufficiently supports the inference that the Pollitts, the Warfields and the Holtzclaws relied upon the appellant to serve as the attorney for both them and the seller at the property settlements, reposing trust and confidence in him to represent their interests and to see that their purchase money was properly applied to obtain the release of any preexisting liens upon their properties in order to give them free and clear titles. The reassurances given by the appellant directly, and through Paxton, that all liens would be paid off within five days, thus disposing of any necessity to give notice otherwise, supports this inference. The clear instructions given to the appellant by the two lending institutions further support such an inference.

The appellant claims additionally that the evidence failed to show that he personally profited — that he appropriated any of the funds *to his own use* He reads § 132 too narrowly. What is proscribed is the fraudulent and wilful appropriation "to any use and purpose not in the due and lawful execution of his trust." Where the evidence permits the inference (as it clearly did) that the purchase money entrusted to the appellant by the Pollitts, the Warfields and the Holtzclaws, respectively, for the purpose of releasing any encumbrances and providing clear titles was fraudulently and wilfully put to some other purpose, the crime is complete. It matters not whether the direct benefit of the misappropriation went to the appellant himself, to Mel Clark, to Clark-King Construction Company or to any other.

The same principle applies here as in a case of false pretenses, whereof Chief Judge Orth said for this Court in *Polisher v. State*, 11 Md. App. 555, 580-581, 276 A. 2d 102:

"The argument fails because '[t]here is no

> doctrine of *lucri causa* in the field of false pretenses. It is accordingly immaterial that the defendant did not gain or intend to gain any personal benefit or advantage from obtaining the property from the victim.' *Id.* [2 Wharton's *Criminal Law* (Anderson Edition)] § 583, p. 309. '[T]he defendant is responsible for his false pretense even though he did not personally gain any benefit from the goods which had been obtained thereby.' *Id.*, § 585, p. 316. It is stated in Hochheimer, *Criminal Law* (2nd Ed. 1904), § 323, p. 356: 'It is sufficient that the thing has been confided to the offender, it being immaterial that he did not obtain it on his own account, nor for his own gain or benefit.' "

The appellant attempts to negate the elements of wilfulness and fraud by postulating mere negligence or mistake. That was a question properly for the jury, and they resolved it against him. The overall pattern established in multiple transactions, the appellant's personal knowledge of prior encumbrances both as Clark-King's attorney and as trustee for the accompanying deeds of trust, his preparation of settlement sheets in his own handwriting, his preparation of separate settlement sheets and his scheduling of separate settlements for seller and buyer, his working agreement with Clark, his silence in the face of Hitchen's accusations, his subsequent obtaining of all five releases for the hidden encumbrances on the three properties two years later and only after a criminal investigation into his activities had begun all permitted the jury reasonably to infer that his conduct was wilful and fraudulent and not simply negligent. The evidence was legally sufficient to permit the three counts charging fraudulent misappropriation by a fiduciary to go to the jury. *Williams v. State*, 5 Md. App. 450, 459, 247 A.2d 731; *Metz v. State*, 9 Md. App. 15, 23, 262 A. 2d 331.

3. Adequacy of False Pretenses Charges

Four of the five false pretenses charges allege offenses

against the Title Insurance Company of Minnesota. As to these four counts, the appellant asserts that they fail to charge an offense in that they fatally "omitted the element of 'intent to defraud.'" Section 140 provides, in pertinent part:

> "Any person who shall by any false pretense obtain from any other person any chattel, money or valuable security, *with intent to defraud any person of the same*, shall be guilty of a misdemeanor . . ."

The underlined words clearly set out the specific intent or special mens rea of the crime. Section 609, dealing with the form of a false pretenses charge, provides:

> "In any indictment, information or warrant for false pretenses, it shall not be necessary to state the particular false pretenses intended to be relied on in proof of the same and in any such indictment, information or warrant *it shall be sufficient to use a formula substantially to the following effect*: 'That A-B on the ..... day of ....., 19...., in the County (City) aforesaid, unlawfully and knowingly, by a certain false pretense, did obtain from C-D (here listing the articles obtained) of the goods, chattels, moneys and property of C-D, with intent then *and there to defraud*, in violation of Article 27, Section (here state section violated), of the Annotated Code of Maryland; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.'" (Emphasis supplied).

The false pretenses count charging an offense against Standard-Young Associates did, between the naming of the victim and the words "in violation of Article 27, Section 140," insert the words "with intent then and there to defraud." The other four false pretenses charges inadvertently jumped from the naming of the victim to the

words "in violation of Article 27, Section 140" and omitted the seven-word prepositional phrase now in issue. The point is a nice one.

The appellant may not take succor, as he seeks, in *Dunphy v. State*, 13 Md. App. 671, 284 A. 2d 631. The count there held to be inadequate "completely omitted the element that any chattel, money or valuable security was obtained by the false pretense," *id.* at 13 Md. App. 674, the indispensable gravamen of the offense. It is nonetheless clear that the specific "intent to defraud" is an essential element of the crime of false pretenses. *Polisher v. State, supra*, at 11 Md. App. 560. It is true that appellant did not raise the question below, Maryland Rule 725 b, but where a charge fails to state an offense, by failing to allege all necessary elements of the crime, appellate review is not foreclosed by such failure. *Phenious v. State, supra*; *Ward v. State*, 9 Md. App. 583, 587, 267 A. 2d 255. "The validity of the legal principle redeclared in *Baker* [*Baker v. State*, 6 Md. App. 148, 250 A. 2d 677] — that attacks upon indictments failing to charge an offense are of jurisdictional dimension and require appellate review whether or not the issue was raised below — is beyond doubt." *Urciolo v. State*, 19 Md. App. 123, 139, 310 A. 2d 165, reversed on other grounds in *Urciolo v. State*, 272 Md. 607, 325 A. 2d 878.

The use of the adverbs "unlawfully and knowingly" in the counts now under review will not fill the breach, for they are descriptive of general *mens rea*. In *Baker v. State*, 6 Md. App. 148, 250 A. 2d 677, Judge Orth dealt with the necessity of alleging a specific intent where it is an element of the crime, saying at 6 Md. App. 154:

> "In charging the substantive offense the general rule is that the criminal intent of the accused must be alleged when the criminality of an act depends upon the intent with which it was done, as when the statute makes such intent one of the constituent elements of the offense. 4 *Wharton's Criminal Procedure* (Anderson) § 1773, p. 576. That is to say, when an act is by statute made criminal only if

done with a particular intent, the intent must be alleged and proved according to the terms of the statute. *Joyce on Indictments*, 2d Ed., p. 450. See also *Hochheimer Criminal Law*, 2d Ed., § 102, p. 123; 41 Am. Jur. 2d 951; 42 C.J.S. 1027. It follows that when the indictment charges an attempt to commit an offense, an essential element of which is a specific intent, the required specific intent of the offense charged as attempted must be averred. 'Specific intent to commit the offense charged in an indictment, of which intent is an essential ingredient, is not sufficiently averred by an allegation that the accused did the acts charged in an attempt to commit the offense charged, when such acts also constitute an entirely distinct and separate offense * * *.' 4 *Wharton's Criminal Procedure, supra*, § 1773, p. 577."

See also 32 Am.Jur.2d, *False Pretenses*, § 62, "Indictment and Information — Intent to defraud . . .", p. 214: "An indictment for obtaining something of value by means of false pretenses must allege that pretenses were made with intent to defraud." Accordingly, we hold the four counts charging false pretenses against the Title Insurance Company of Minnesota to have been fatally defective.

4. Legal Sufficiency of Evidence on Remaining False Pretenses Charge

In reviewing the legal sufficiency of the evidence to prove false pretenses, we are left with the single count alleging the victimization of Standard-Young Associates. As we undertake to assay the sufficiency of that evidence, we measure it against the standard articulated in *Polisher v. State, supra*, at 11 Md. App. 560:

"The false pretense is the crux of the crime. So the crime is committed when a person:

1) by making a false representation of a past or existing fact;
2) with intent to defraud; and

3) knowledge of its falsity;
4) obtains any chattel, money or valuable security from another;
5) who relies on the false representation;
6) to his detriment."

See also *Smith v. State*, 237 Md. 573, 207 A. 2d 493; *Tumminello v. State*, 10 Md. App. 612, 272 A. 2d 77; *Lockhard v. State*, 3 Md. App. 580, 240 A. 2d 312.

The false pretense perpetrated on Standard-Young Associates involved the sale of another of the lots in Section 10 of the Potomac Woods subdivision — Lot 13, Block T (hereinafter Lot 13T). As security on a note, Clark-King had executed a deed of trust to the State National Bank on a number of Potomac Woods lots, including 13T, which deed of trust was recorded on August 2, 1968. As security on yet another note, Clark-King executed a deed of trust on a number of the Potomac Woods lots, including 13T, to an Arthur Dale Lumsden which deed of trust was recorded on October 9, 1968. The appellant was actually the trustee for the deed of trust to the State National Bank and was personally responsible thereunder for signing any releases as to individual lots.

The history of Lot 13T is significant in demonstrating facts from which the jury could reasonably infer subsequent "knowledge of falsity" on the part of the appellant. In November of 1969, Clark-King could not pay off two of its bricklayers — Antonelli and Caniglia — and in satisfaction of a $10,000 debt conveyed to them the title to Lot 13T. The appellant handled the settlement and prepared the report of title. The report of title recited that there were no outstanding mortgages or deeds of trust on 13T. The seller's settlement sheet — prepared by the appellant for Clark-King — listed, however, the two outstanding deeds of trust. Mel Clark testified that it was at about this time that straightened financial circumstances made it impossible for him to discharge prior deeds of trust on lots which he sold. It was at this time that he and the appellant came to an understanding whereby the appellant would procure the

releases with his own money and then be reimbursed by Clark-King at the time of the next settlement.

A small memorandum-type note — analyzed to be in the handwriting of the appellant — was found clipped to the file of this 1969 sale of 13T from Clark-King to Antonelli and Caniglia. It read, "Marlene, set up deferred card for Clark like Damazo's and list this case (two trusts on it)." The years went by and the notes were never paid and the deeds of trust on 13T were not released. In 1971, the Lumsden note, secured by the deed of trust, was obtained by Clark-King and in turn pledged to the Madison National Bank as security for a $24,000 loan. Lot 13T remained deeded in trust as part of this security, although releases were obtained on other lots on a one-by-one basis.

George Young first came into contact with Lot 13T in the summer of 1972. He was a small builder in Montgomery County. A word is in order as to the capacity in which Young did business, since the appellant claims, among myriad other claims of legal insufficiency, that there was a fatal variance between *allegata* and *probata* as to the victim of this particular false pretenses count. The information recited that the victim was "Young Contracting Company, Inc., a corporation, and Standard Investment Corporation, a corporation, trading as joint venturers under the name of Standard-Young Associates." The appellant charges that there was no evidence that either Young Contracting Company, Inc., or Standard Investment Corporation was a corporation and relies on *Stackhouse v. State*, 1 Md. App. 399, 230 A. 2d 358, to require reversal where there is a fatal variance. The contention is without factual predicate. Young testified that he was "connected with" two "building corporations" and then identified "Young Contracting Corporation" and "Standard[1] Development Corporation" by name. Young testified that he was the secretary of both corporations. Young testified further that the articles of incorporation for "Standard" were drawn up by a District of

1. The transcript initially mistakenly referred to "Steven" rather than to "Standard," but subsequent reference cleared up any ambiguity.

Columbia attorney and that the articles of incorporation for "Young Contracting" were drawn up by someone in the appellant's office. The proof of the corporate characters was abundant.

Young had known and worked with the appellant for several years prior to 1972. Shortly prior to July of 1972, the appellant took the initiative and approached Young about the purchase of Lot 13T. The appellant indicated that it belonged to "some accounts of his who owned it and they needed the money and they'd love to have it sold." Young agreed to purchase it for $12,000. A contract of sale was signed on June 14, 1972. The appellant was listed as the settlement attorney. The contract, in the appellant's handwriting, recites, "The property, including the aforesaid chattel, is sold free of encumbrance, except as aforesaid." The "aforesaid" references pertain to two matters not here relevant and did not allude, in any manner, to the deeds of trust held by the State National Bank or the Madison National Bank (securing the Lumsden note).

The settlement was held on July 17, 1972, presided over by the appellant. Young inquired as to whether he would need a title insurance policy, and the appellant assured him that he would not. The real estate broker, due to receive the commission on the sale, was Kensington Associates Realty, Incorporated. The minutes and stock ledger of Kensington Realty show that every share of stock in that corporation is owned by the appellant. The seller (apparently having obtained the property from Antonelli and Caniglia) was Mt. Vernon Development Corporation. The corporate records of Mt. Vernon indicated that in 1967 100 shares of stock had been issued to the appellant as "attorney, Trustee for owners." There was no other indication of the ownership of Mt. Vernon.

Standard-Young Associates gave $7,000 in cash and gave a note to Mt. Vernon for the additional $5,000 needed to meet the purchase price. After the settlement, Young obtained a construction loan upon the understanding that there were no superior encumbrances on the property. A title insurance

binder had to be issued to the lender guaranteeing a good title. June Stup, the appellant's secretary, was to prepare the form. She was given by the appellant as a model the earlier form from 1969 from Clark-King to Antonelli and Caniglia, showing a free and clear title. Because office files showed encumbrances, however, she personally questioned the appellant about such a certification. He told her "to type the title insurance binder identically as it was shown on this piece of paper." Young began the construction of a home and sank approximately $15,000 into the project. In September, 1971, the Lumsden note was in default and Madison National Bank was no longer under an obligation to release individual lots upon partial payments. That was the situation when the appellant sold Lot 13T to Standard-Young Associates in July, 1972.

In September, 1972, Madison National Bank elected to foreclose on the deed of trust. Clark conferred with the appellant. The appellant sent Clark to Madison National Bank with a check for $2,000 drawn on his own account to try to obtain a release on Lot 13T. The bank would not agree, there being at that time only two lots left to secure a debt of $16,000. The bank gave notice to Standard Savings and Loan Association, the lender to Standard-Young Associates, and all construction on the partially completed house ground to a halt on September 12, 1972. It could not resume until November 8, 1972.

Young immediately confronted the appellant and demanded to know why the title had not been free and clear. The appellant issued Young a title insurance policy from the Title Insurance Company of Minnesota, of which the appellant was an agent. The insurance company subsequently had to purchase the Lumsden note from the Madison National Bank for $7,000 in order to give Standard-Young Associates their clear title. In October, 1972, the appellant had paid $1,000 to State National Bank to obtain a release from them as to Lot 13T.

We have no difficulty in concluding that the evidence was sufficient to have permitted the jury reasonably to infer that the appellant falsely represented to Standard-Young

Associates that there were no hidden deeds of trust on Lot 13T, that the appellant made the false representation with knowledge of its falsity and with intent to defraud, that he caused them to part with $12,000 to their detriment in reliance upon the false representation. That the victim could not place a monetary figure on the loss occasioned by the two-month halt in construction or upon the risk it unnecessarily ran above and beyond that halt is immaterial. In 2 Wharton, *Criminal Law and Procedure* (Anderson Edition, 1957), the following is said, at § 602, pp. 360-361:

> "To consitute the offense of obtaining property by false pretenses it is necessary to show that the actions of the victim in reliance on the defendant's misrepresentations have caused the victim loss or that the victim has been prejudiced in some way. It is not necessary that the victim has sustained actual money loss. Loss is sustained even though the victim has incurred merely a conditional or future liability, such as that based on negotiable instruments. The fact that the victim has been indemnified or may possibly be indemnified for his loss, or that restoration of the property or money has been made, does not prevent the prosecution of the defendant for false pretenses."

In 32 Am.Jur.2d, *False Pretenses*, § 38, "Injury or prejudice resulting from transfer," it is said, at p. 200:

> "[T]he gravamen of the offense is in the making of the false pretense with intent to defraud and thereby obtaining another's property. So it is not essential that the victim suffer a permanent loss or that he sustain a pecuniary loss. The offense is complete when money or property has been obtained by false representations, and it cannot be purged by subsequent restoration or repayment. Accordingly, where a person induces another, by means of false pretenses, to part with his property, he cannot defend against a charge of obtaining property by false pretenses by showing that the

> person who parted with his property had recovered in a civil action the value of the property, or by showing that the victim had recovered by other means or from other sources. Nor will the actual repayment of a loan obtained by false pretenses constitute a defense against a criminal prosecution for obtaining money by false pretenses."

See *People v. Jones*, 36 Cal. 2d 373, 224 P. 2d 353; *State v. Mills*, 96 Ariz. 377, 396 P. 2d 5; *Pepper v. People*, 75 Colo. 348, 225 P. 846.

Of similar import is Perkins, *Criminal Law* (2d Edition, 1969), at 313-314:

> "[T]here is no requirement of actual pecuniary loss on the part of the intended victim. If the false representation was with reference to the security given for money borrowed, or property purchased on credit, it is no defense to a charge of false pretenses that the debt has since been paid."

And see *Baskerville v. State*, 23 Md. App. 439, 327 A. 2d 918.

5. Search and Seizure — Introduction of Search Warrant

The appellant's claim that fruits of two simultaneous searches and seizures should be suppressed because the State failed to introduce the warrants and the applications for the warrants is fatuous. A search warrant for the appellant's law office at 3700 Decatur Avenue, with a supporting affidavit and application of thirteen tightly typed legal size pages and twenty-five additional pages of supporting exhibits, is part of the record. A search warrant for the office of the Mt. Vernon Development Corporation at 3514 Plyers Mill Road, with a supporting affidavit and application of fourteen tightly typed legal size pages and twenty-four additional pages of supporting exhibits, is also part of the record.

Also in the record is the Petition of the State, filed on April 6, 1973, to have the two original search warrants, then

in the custody of the Clerk of the Court of Montgomery County, forwarded to Frederick County, to which the trial had been removed, and made a part of the record in anticipation of the then pending hearing on the appellant's motion to suppress physical evidence. On April 6, 1972, Judge Philip M. Fairbanks, of the Circuit Court of Montgomery County, signed the following order:

> "ORDERED, that two original search warrants, their supporting applications and affidavits and accompanying returns, entitled 'State of Maryland vs. The Premises Known As Law Offices of Peter Christian Andresen * * * 3700 Decatur Avenue * * *' and 'State of Maryland vs. The Premises Known As Mount Vernon Development Corporation * * * Known As 3514 Plyers Mill Road * * *, executed in October, 1972, now in the possession of the Clerk of the Circuit Court for Montgomery County, be transferred by him under his seal and with his oath or affirmation as to the period of time they have been in his custody, to the Clerk of the Circuit Court for Frederick County for the purpose of their introduction into the records of Criminal Nos. 13189, 13238, 13239, and 13240 (removed to the Circuit Court for Frederick County and there known as Criminal Nos. 3100, 3101, 3102 and 3103, respectively), before April 11, 1973 at ten o'clock a.m."

A full suppression hearing was held before Judge Barrick in Frederick on April 11 and 12, 1973. The record of that hearing runs to 375 pages. Throughout the hearing, extensive references were made on numerous occasions to the warrants and the applications. The inescapable import is that both advocates and the judge were referring to and reading from the warrants and their applications. On several occasions, Judge Barrick admonished the State not to have witnesses read from the warrant because "the warrant speaks for itself."

It is clear from the suppression hearing that the search

warrant and accompanying affidavit and application for 3700 Decatur Avenue was Defendant's Exhibit #1. The court even went so far as to offer the formal document to the appellant's attorney:

"MR. LAMB: Your Honor, is there a copy of the affidavit in the file?

THE COURT: Yes.

MR. LAMB: Well, let me proceed a little further. With regard to the investigation, were two affidavits prepared in support of the search warrants?

A. There were two premises, two affidavits.

Q. Are the affidavits in both warrants for both premises exactly the same but for the location to be searched?

A. I have no idea at this time whether both were identically the same or — or —

Q. You knew at the time you signed them whether they were the same — you read them?

THE COURT: They're here in the file, Mr. Lamb.

MR. LAMB: The only problem, Your Honor, I only have my copy which has handwritten notes —

THE COURT: You're welcome to the file.

MR. LAMB: I'm trying to limit it from the standpoint of, are the affidavits the same.

THE COURT: Well, they're right here, and you can determine that by looking at them — they're right here. I'll be glad to give you the whole file.

MR. LAMB: I'll use the affidavit, Your Honor, which — Your Honor, I would ask that this be marked for purposes of the record as Movant's Number 1 — Defendant's Number 1.

Def Exh 1 thereupon marked.

MR. LAMB: Agent, I show you what has been marked Defendant's Exhibit 1 and ask if you can identify that.

A. Yes, sir.

Q. What is it?

A. Affidavit in support of search warrant.

Q. What address is named therein?

A. This particular address is 3700 Decatur Avenue, Kensington, Maryland."

Special Agent Austin Moyer was then examined extensively about the content of the supporting application. At one point, appellant's attorney solicited from the witness information extraneous to the warrant application and was brought up short by Judge Barrick, "Let me interrupt a moment, Mr. Lamb. As I understand the law as far as search warrants are concerned, we've got to decide it on the basis of what is within the four corners of the affidavit."

The central controversy swirled about the number and nature of items seized under the warrants. The "returns" became important and the two "returns" were, by general agreement, incorporated into and made a part of Defendant's Exhibits 1 and 9, which were the respective search warrants and accompanying applications. Although the magic words, "We hereby formally introduce the search warrants as exhibits," may not literally have been uttered, the clear context of the entire suppression hearing makes it manifest that they were Defendant's Exhibits 1 and 9, respectively:

"MR. LAMB: Your Honor, may I point out something. We might as well make the return on the warrant part of Defendant's Exhibit 1, the return on the warrant itself for Plyers Mill Road. That's only the warrant and the application.

THE COURT: All right, put the return with it. You don't have the return?

MR. LAMB: No, Your Honor, I only have my copy of it.

MR. WERNER: Here it is.

THE COURT: We're putting the return with Exhibit [8] — we're talking about — we're connecting the report and return with the affidavit and the search warrant as Defendant's Exhibit 1.

MR. LAMB: I want to be sure he's looking at —

THE COURT: Introduce the other search warrant with the affidavit — that's [9].

MR. WERNER: Nine.

MR. LAMB: These are things he pulled out of the file as proffered by the State as being on the return.

REDIRECT EXAMINATION

BY MR. LAMB:

Q. Agent, I show you what has been marked Exhibit 9 for identification and ask if you can identify it.

A. Yes, sir, I can.

Q. What is it?

A. Affidavit — application for search warrant, 3514 Plyers Mill Road, Kensington, Maryland.

Q. With attachments and return?

A. With attachments and return."

The ten-page Memorandum and Order of Judge Barrick, moreover, analyzes and recites extensively from the warrant applications. Under the circumstances, *Duggins v. State*, 7 Md. App. 486, 256 A. 2d 354 (where the State declined to produce a warrant, choosing instead to rely exclusively upon the testimony of arresting officers to establish the validity of the arrest); *Campofreda v. State*, 15 Md. App. 693, 292 A. 2d 703 (where neither a warrant nor a completed copy was offered in evidence and where the "copy" actually read by the court was not signed and had a number of blank spaces); and *Brooks, Keaton and Patterson v. State*, 13 Md. App. 151,

282 A. 2d 516 (where a second search warrant depended upon the validity of a first search warrant but did not incorporate the first application as a part of the second application), relied on by the appellant, are not remotely apposite.

6. Search and Seizure — No General Warrant

A later contention (# 9) will deal specifically with the appellant's charge that the particularity clause of the Fourth Amendment was violated by the allegedly overbroad seizure of items during the actual executions of the two warrants. This contention confines itself to the facial character of the two warrants. It is claimed that their lack of adequate particularization in terms of "the things to be seized" condemns them as constitutionally forbidden general warrants, authorizing indiscriminate rummaging through the private papers of the appellant.

Animating our review, as we attempt to keep the emotionally highly-charged phrase "general warrant" in proper historical and semantic perspective, is *Hignut v. State*, 17 Md. App. 399, 417, 303 A. 2d 173:

> "We caution against a marked tendency of late toward a loose employment of the notion 'general warrant'. In *Harris and Schmitt v. State*, 17 Md. App. 484, 302 A. 2d 665, Judge Scanlan traces perceptively the history of the 'general warrant' and its colonial counterpart, the 'writ of assistance'. These parallel instruments of governmental oppression aroused great furor on both sides of the Atlantic throughout the 1760's and 1770's. They were a contributing spark to the American Revolution. They were vivid in the apprehensive recollection of the constitution makers of the 1770's and 1780's, state and federal, who established protections to guard specifically against them. A decent respect for history and a careful use of language compels us to remember that the notion of a 'general warrant' did not contemplate every minor imprecision in draftsmanship giving rise to

some arguable ambiguity or fleeting confusion. The 'general warrant' was a roving commission to police agents, in seeking out certain types of crime, to search anyone or any place, at any time, anywhere. The niggling complaint at bar is antipodal to the broad issue over which we fought a Revolution. Magna Charta need not be invoked everytime a policeman dots the wrong 'i'."

And see *Frey v. State*, 3 Md. App. 38, 46, 237 A. 2d 774.

The heart of the appellant's complaint is the use of the phrase "together with other fruits, instrumentalities and evidence of crime at this time unknown" to conclude the catalogue of things to be seized. A reading of the warrants in full, however, makes it apparent that the suspect phrase is tied explicitly to those items which might show a violation of the false pretenses law with respect to the sale of Lot 13T.

The warrants, identical in terms of describing the things to be seized, are models of particularity. They command the executing officers to seize:

"... the following items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland:

title notes, title abstracts, title rundowns; contracts of sale and/or assignments from Raffaele Antonelli and Rocco Caniglia to Mount Vernon Development Corporation and/or others; lien payoff correspondence and lien pay-off memoranda to and from lienholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lenders instructions for a construction loan or construction and permanent loan; disbursement sheets and disbursement memoranda; checks, check stubs and ledger sheets indicating disbursement upon settlement; correspondence and memoranda concerning disbursements upon settlement; settlement statements and settlement memoranda; fully or partially prepared deed of trust releases,

whether or not executed and whether or not recorded; books, records, documents, papers, memoranda, and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland, 1957 Edition, as amended and revised, together with other fruits, instrumentalities and evidence of crime at this time unknown."

We read the questioned phrase as referring to "other fruits, instrumentalities and evidence" of the crime of false pretenses with respect to Lot 13T. (We do not intimate, by any negative implication, that the result would necessarily be otherwise even if we read the phrase more broadly. It is simply unnecessary to this decision to consider such a question.)

7. Plain View Seizure of State's Exhibit 10A

Of all of the items seized which were not suppressed and which ultimately were received in evidence, only one (State's Exhibit 10A) arguably was not particularly described by the warrants. It was a deed of trust prepared on March 27, 1972, conveying certain lots from Clark-King to the F. O. Day Company as security for a $47,000 loan from F. O. Day Company to Clark-King. The significance is this. The new $47,000 loan had nothing to do with an earlier $37,000 loan from F. O. Day to Clark-King, also secured by an earlier deed of trust. The appellant instructed one of his secretaries to add the following words to the deed of trust: "Part of this deed of trust secures an existing deed in the amount of $37,000 upon which the recording tax was paid in Liber 3934, Folio 0772, therefore recording tax is due only on $12,000." That was not true and was nothing but an attempt to lower the recording tax due Montgomery County. Peter Hitchen, the Treasurer of the F. O. Day Company, had kept a photocopy of the original deed of trust without the added language. When he received a copy of the recorded deed of trust with the supplemental language, he noticed the

discrepancy and notified the appellant of the impropriety. Hitchen fully informed Special Agent Joseph Lawrence of this entire matter and Agent Lawrence had this information in his recent memory when he executed one of the search warrants. In the course of his legitimate search of the files for the various particularly described items relating to Lot 13T, he came across this typed deed of trust and immediately recognized its significance. (Hitchen's copy was not sufficient because of the desire to make a typewriting analysis.) This is a classic instance of a Plain View Doctrine seizure — a recognized exception to the warrant requirement whereunder a prior valid intrusion for one purpose will legitimate the warrantless seizure of evidence of crime inadvertently spotted in plain view. *Coolidge v. New Hampshire*, 403 U. S. 443, 464-473, 91 S. Ct. 2022, 29 L.Ed.2d 564, 581-587 (1971); *Warden v. Hayden*, 387 U. S. 294, 87 S. Ct. 1642, 18 L.Ed.2d 782 (1967); *Frazier v. Cupp*, 394 U. S. 731, 89 S. Ct. 1420, 22 L.Ed.2d 684 (1969); *Cady v. Dombrowski*, 413 U. S. 433, 93 S. Ct. 2523, 37 L.Ed.2d 706 (1973); *Brown v. State*, 15 Md. App. 584, 292 A. 2d 762.

After a painstaking review of the entire record of this lengthy and complicated trial, we would be derelict not to record our thoroughly deliberated alternative holding that even if there had been error in this regard (and we explicitly hold there was not), it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). The significance of State's Exhibit 10A went only to Counts 15, 16 and 17 of Indictment 3103, charging false pretenses upon Montgomery County, failure to pay the recordation tax and misrepresentation of a taxable consideration, respectively. These three counts were ultimately dropped by the State. The appellant, therefore, suffered no remote prejudice.

8. Search and Seizure — Probable Cause

Indefatigably, the appellant has presented under the umbrella of this eighth contention, six subcontentions. Several are ingenious, even if meritless.

a. Object of the Search Warrant

The appellant points to Art. 27, § 551, *Search Warrants*, as authorizing a search where probable cause has demonstrated that "any misdemeanor or felony *is being committed* by any individual or in any building, apartment, premises, place or thing." (Emphasis added) He argues that the warrant applications of October 30, 1972, focus upon an alleged crime of false pretenses that was consummated and complete, by the very allegations in the warrant applications, on July 17, 1972. He reasons that on October 30, the crime was already an act of history and was not *still being committed*. Inadvertently (or advertently), the appellant did not read on in § 551, wherein the very next clause sets out the additional legitimate object of a search warrant: "or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing." That any evidence of past crime — including "mere evidence" in contrast to contraband, fruits or instrumentalities — is seizable under the Fourth Amendment was made clear by *Warden v. Hayden, supra*. As Chief Judge Murphy also made clear in *Salmon v. State*, 2 Md. App. 513, 517-519, 235 A. 2d 758, the Fourth Amendment to the Federal Constitution, on the one hand, and Article 26 of the Maryland Declaration of Rights along with Art. 27, § 551, on the other hand, are provisions *in pari materia* and protect like rights in a like manner.

b. Staleness of Probable Cause

The thrust of this subcontention is that various observations of activity on the part of the appellant made significantly prior to October 30, 1972, even if such observations indicated criminal behavior *then*, did not yield the likelihood that evidence of such crime was still present on the appellant's two business premises as late as October 30.

The affiants upon the warrant applications were Special Investigators Austin Moyer and Joseph Lawrence. Their painstaking investigation which produced the two

exemplary warrant applications before us took place throughout September and October of 1972. On October 25, they interviewed George and Audrey Young and reduced the detailed recitations of the Youngs to six typewritten pages. The Youngs had been present for the crucial settlement in the appellant's law office on July 17. The affiants checked the stock ledger sheets of Kensington Associates Realty, Inc. in late September and found that the company was owned by the appellant. At the end of September, the affiants checked the stock ledger sheets of the Mt. Vernon Development Corporation — the seller of Lot 13T — and found that it was controlled by the appellant. One of the search warrants was for the 3514 Plyers Mill Road office of Mt. Vernon Development Corporation. John Sivers was interviewed in early September and confirmed the appellant's ownership of Mt. Vernon for his "own personal gain." Robert Freedman, the General Counsel and Director of Standard Savings and Loan Association, was interviewed in October. Deborah Nalls, a special investigator trained in real estate law, checked the land records and discovered, *inter alia multa*, a release from the State National Bank on Lot 13T as late as October 3, 1972. Norman Hecht, the Vice President of Madison National Bank, was interviewed on October 27 and revealed that as of that time Lot 13T had not been released from the Lumsden trust.

As an indication that files relating to the Potomac Woods lots generally and to the appellant's records for Clark-King were still in the appellant's offices in late October, 1972, the affiants interviewed William Hancock and E. Harold Patterson, owners of County-Wide Realty Company, on October 19. They related that the appellant was scheduled to handle the settlement on Lot 13S (also in the Potomac Woods subdivision) "within the next few weeks or so." Peter Hitchen, the Comptroller of F. O. Day Company, was interviewed on October 19 and turned over papers prepared by the appellant relating to Lot 13S as late as September 26. Mel Clark was interviewed on October 19 and turned over the books and records of Clark-King. He indicated that as of

that time the appellant was still acting as his settlement attorney.

We cannot doubt that the probable cause was not simply abundant but vitally fresh. *Taylor v. State*, 17 Md. App. 536, 302 A.2d 646, relied on by the appellant, is not remotely applicable. There, a lapse of thirty days between a single observation and the issuing of a search warrant for a pool hall rendered the probable cause fatally stale. The single observation, however, had been of a hypodermic syringe being passed from one customer to another. The heart of our holding there did not go to the time factor as such but to the lack of a logical link between an isolated customer's act and the host premises:

> "The sole observation by the informant of two patrons of Brownie's Pool Hall passing a hypodermic syringe between them does not, in and of itself, give rise to a rational inference that narcotics were being kept or stored in the premises any more than a single observation of a lottery slip being passed between two customers of a restaurant would give rise to a rational inference that an illegal gambling operation was being conducted in that restaurant." Id. at 17 Md. App. 543.

The general rule as to staleness was set forth for this Court by Judge Gilbert in *Johnson v. State*, 14 Md. App. 721, 729-730, 288 A. 2d 622:

> "There is no statute in this State providing that the facts in the application, set forth to establish probable cause, must result from observations made within a designated time before the issuance of the warrant. Nor do we find any cases which lay down a rigid rule. However, the remoteness of the facts observed from the date of the issuance of the warrant is an element to be considered in each instance by the issuing authority in determining whether it appears that there was probable cause.

> *Clayton v. State*, 1 Md. App. 500, 503. The issue, therefore, is whether this lapse of 26 days between the observation of the facts and the issuance of the warrant, was so remote, *when considered in the circumstances of this case*, so as to invalidate the search warrant. *Clayton v. State, supra*, at 504. See Varon, *supra*, at 322; 100 A.L.R.2d 525."

And see Rosenblatt, "'Stale' Probable Cause in Search Warrants," *Search and Seizure Law Report*, Vol. 1, No. 4, (February, 1974); *State v. Edwards*, 266 Md. 515, 295 A. 2d 465; *United States v. Johnson*, 461 F. 2d 285 (10th Cir. 1972); *United States v. Harruff*, 352 F. Supp. 224 (E.D. Mich. 1972); *United States v. Cotham*, 363 F. Supp. 851 (W.D. Texas 1973); *United States v. Guinn*, 454 F. 2d 29 (5th Cir. 1972); *United States v. Harris*, 482 F. 2d 1115 (3rd Cir. 1973).

The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed. The massive records and files of the appellant-attorney and his protean corporate extensions in this case are more akin to the latter than to the former. In terms of non-staleness, the probable cause here was still as the first dew of the morn.

c. Attempt to Controvert Truth of Warrant Applications

Although nothing suggested by the appellant's brief or at oral argument indicates that he ever successfully derogated

by one whit either the truth or the accuracy of any of the hundreds of facts set forth in the warrant applications, the controlling answer to this subcontention is that in Maryland a reviewing court — at the hearing level, trial level or appellate level — may not look "beyond the four corners of the affidavit." *Smith v. State*, 191 Md. 329, 335, 62 A. 2d 287; *Collins v. State*, 17 Md. App. 376, 302 A. 2d 693; *Everhart v. State*, 20 Md. App. 71, 81-82, 315 A. 2d 80. The appellant's reliance upon *Carter v. State*, 18 Md. App. 150, 305 A. 2d 856, for the proposition that a reviewing court may go "beyond the four corners of the affidavit" is bizarre, since in that case there was neither a warrant nor a supporting affidavit. The appellant's present use of the Court of Appeals decision in *Clark-King Construction Co. and Andresen v. Salter, et al.*, 269 Md. 494, 307 A. 2d 485, decided on July 20, 1973, not for its legal principle but as proof of a fact in an attempt to vitiate one ostensibly contrary fact in the warrant applications, is inappropriately after-the-fact. That decision came down after the warrant applications were prepared (and, indeed, after both the pre-trial suppression hearing and the trial itself had been completed).

d. Probability as to the Two Locations Searched

This subcontention assumes probable cause for the existence *somewhere* of evidence of false pretenses but challenges the probability of either 3700 Decatur Avenue or 3514 Plyers Mill Road being that "somewhere." Equating "probable cause" or "probability" with "more likely to be true than not" or "a greater than 50 per cent chance," the appellant reasons cleverly that although probable cause may exist that the evidence sought is "in A or B," who can say with the requisite degree of probability which? (If the evidence is "probably" at 3700 Decatur Avenue, is it not a necessary implication that it is "probably *not*" at 3514 Plyers Mill Road and vice versa? "How could the same particular documents sought be present at two different locations?" May a known diamond thief hold out two clenched fists, turned down as in a childhood game, and challenge the police to say with probability whether the stolen gem is in his right

hand or in his left?) Leaving for another day the rich metaphysical possibilities in articulating why such an absurd but titillating proposition cannot be the law, it is enough for present purposes to hold that there was probable cause to believe that *some* of the evidence sought was in each of the two locations.

The settlements were held at 3700 Decatur Avenue. That was the appellant's law office and the logical (probable) repository for his files and records. We note, moreover, that at least three of the exhibits offered in support of the warrant applications show that copies were to be mailed to the appellant at 3700 Decatur Avenue.

With respect to 3514 Plyers Mill Road, that was the office of the Mt. Vernon Development Corporation, which was "controlled" by the appellant and which sold Lot 13T to Standard-Young Associates. The application for 3514 Plyers Mill Road contained all of the facts contained in the companion application and a few additional ones as well. On September 26, 1972, Agent Moyer went to 3514 Plyers Mill Road and there observed Charles G. Bieber conducting business at a desk and over a phone. Bieber had been the signatory for Mt. Vernon in purchasing Lot 13T from Antonelli and Caniglia and in selling Lot 13T to Standard-Young Associates. The sales contract with the former listed the "address of the purchaser" as 3514 Plyers Mill Road. June Stup, the appellant's secretary in his law office at 3700 Decatur Avenue, confirmed that Bieber and Mt. Vernon operated out of 3514 Plyers Mill Road. Carl Zentz, employed as a title searcher and then as a supervisor of all searchers by the appellant, confirmed that various "title notes, title abstracts, and title rundowns prepared for" the appellant are "normally and typically kept" in both locations.

e. Veracity of Non-Swearing Informants

The appellant contends that little, if any, of the information in the applications comes directly from the two affiants, but rather is hearsay from a wide number of off-warrant declarants — secondary sources — informants.

That observation is accurate. He then challenges the veracity of these informants under *Aguilar v. Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964). The point, though ingenious, need not detain us long.

"That a different rationale must exist for establishing the realiability of citizen-informers than for establishing that of the more suspect and anonymous police informer is widely recognized in recent case law." *King and Mobley v. State*, 16 Md. App. 546, 555, 298 A. 2d 446, quoted with approval in *Mobley and King v. State*, 270 Md. 76, 85, 310 A. 2d 803. As was said in *Dawson v. State*, 14 Md. App. 18, 33, 284 A. 2d 861 (concurring opinion):

> ". . . it is implicit in the Supreme Court's treating of *Aguilar-Spinelli* problems that the rules set out for establishing an informant's credibility are aimed primarily at unnamed police 'informers' rather than at that broad class of secondary sources who are the victims of crime, the disinterested witnesses of crime, other disinterested civilian sources of information or other law enforcement officers. The members of this broad class are generally, but not universally, named. They are not from the criminal milieu."

In the present case, the secondary sources of information were all named and identified. See *United States v. Ventresca*, 380 U. S. 102, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965) and *Rugendorf v. United States*, 376 U. S. 528, 84 S. Ct. 825, 11 L.Ed.2d 887 (1964). George and Audrey Young were the secretary and president, respectively, of the victimized company. Ira Burdette was the general superintendent for the appellant's construction business. John Sivers was a corporation president. Robert Freedman was general counsel and director of a savings and loan association. Frank Marsalek was executive vice president of a land title corporation. Charles Bieber worked for Mt. Vernon Development Corporation. June Stup was the appellant's secretary. Carl Zentz was the appellant's title searcher. Bruce Covert and Norman Hecht were vice presidents of

banks. Deborah Nalls was a real estate law expert assigned to the Bi-County Fraud Unit. We are persuaded that none of the informants were anonymous police informers "from the underworld milieu" but were rather either "victims of crime, the disinterested witnesses of crime, other disinterested civilian sources of information or other law enforcement officers." As we said in *Dawson v. State*, 11 Md. App. 694, 699, 276 A. 2d 680:

> "The practical distinction is that in dealing with a named source, the very naming of the source and the relationship of the source to the observed information may go a long way (or even by sufficient unto itself), under the facts of a particular case, to establish the credibility of that source or the reliability of his information."

And see Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer L. Rev. 741 (1974), pp. 765-773, "The Problem of the Citizen-Informer."

f. Probable Cause to Believe Crime Committed

As his last subcontention, the appellant challenges the establishment of probable cause generally to believe that the crime of false pretenses had been committed and that evidence of it did exist. After repeatedly going over these lengthy and thorough warrant applications with their numerous supporting exhibits, we are persuaded that the evidence contained therein would probably have been legally sufficient to sustain a conviction, *a fortiori* adequate to establish probable cause for the issuance of search and seizure warrants.

9. Search and Seizure — The So-called "Nexus" Problem

In this contention, both the appellant and the State appear to be tilting at a windmill. The thrust of the appellant's argument and the counterthrust of the State's argument is that the "Nexus Doctrine" of *Warden v. Hayden, supra*, was not (according to the appellant), or was (according to the

State), satisfied. We are unfamiliar with any such legal creature as a "Nexus Doctrine," although we are familiar with the employment of the word "nexus" on a single occasion by *Warden v. Hayden* to describe the effect of the death of the "Mere Evidence Rule."

The language of *Warden v. Hayden* on which both the appellant and the State are hung up is at 387 U. S. 306-307, 18 L.Ed.2d 792:

> "The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must, of course, be a nexus — automatically provided in the case of fruits, instrumentalities or contraband — between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction."

Prior to *Warden v. Hayden*, the Mere Evidence Rule, promulgated by *Gouled v. United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921), had restricted lawful seizures to contraband, fruits of crime and instrumentalities of crime and had forbidden the seizure of "mere evidence," upon the outmoded notion that the government could not establish a superior property right in "mere evidence." Under the intense prodding of the academic community, the Supreme Court in *Warden v. Hayden* abandoned the anachronistic distinction. The language from *Warden v. Hayden* quoted above simply explained how the Fourth Amendment protection had not been diluted by this abolition of the Mere Evidence Rule. It made explicit what was already implicit — that there must (before and after the abolition) be probable cause to believe that the "things to be seized" were, indeed, evidence of crime. Where the "things to be seized" had been contraband, fruits or instrumentalities, their evidentiary value had been self-evident or, in the words of *Warden v. Hayden*, "automatically provided." Since the character of

"mere evidence," by way of contrast, is at first glance more innocuous, the probable cause must establish a link which is not so apparent or "automatic." The bottom line is that, whatever the former classification of the evidence may have been, the probable cause in the warrant application must establish that the particularly described "things to be seized" are, indeed, evidence of crime.[2]

Five of the approximately twelve exhibits which ultimately passed through all of the screens were seized from 3514 Plyers Mill Road. They were all seized from a folder captioned "Potomac Woods General," which contained title rundowns, work sheets, deeds of easement, declarations of covenants, abstract reports, deeds of trust and title binders. One showed that Lot 13T was "Deeded to Antonelli" with additional notations of "STNB" and "Lumsden" (apparently referring to two pre-existing deeds of trust on the lot to the State National Bank and to Arthur Lumsden). A second item taken from the "Potomac Woods" file was a grantor list from Clark-King which gave a liber and folio number for an apparent deed of trust on "13T, Section 10, Potomac Woods." A third item was a handwritten page from a legal pad indicating both a liber and folio reference for a deed of Lot 13T to Antonelli, but also giving the apparent number of the appellant's case file as to that particular transaction. A fourth item was captioned "Unreleased deed of trust made by Clark-King Construction Company, Inc.,

---

2. *Warden v. Hayden* was also a first and more primitive groping toward the Plain View Doctrine exception to the warrant requirement, which doctrine ultimately received full expression in *Coolidge v. New Hampshire*, *supra*. The notion of "nexus" again made explicit what was theretofore merely implicit. The Plain View Doctrine provides that when there has been 1) a prior valid intrusion, one may then 2) seize any evidence of crime inadvertently spotted in plain view. The limitation is that not every object in plain view may be seized, but only those which there is probable cause to believe are evidence of crime. *Stanley v. Georgia*, 394 U. S. 557, 89 S. Ct. 1243, 22 L.Ed.2d 542 (1969) (concurring opinion); *Dixon v. State*, 23 Md. App. 19, 29-35 (and cases there cited), 327 A. 2d 516, 522-525. In the case of contraband, fruits or instrumentalities, the connection is generally readily apparent. In cases of "mere evidence," on the other hand, the nexus (in such cases not "automatic") must be established according to the recognized standard of probable cause. "Nexus" is just another word for "probable cause to believe that the item in plain view is evidence of crime, and therefore, seizable."

Potomac Woods . . . . . Updated through 4/25/72." It specifically indicates that a deed of trust was still outstanding to "State NAT," with liber and folio number, and an additional deed of trust still outstanding to "Lumsden," with liber and folio number. A fifth item did not refer to Lot 13T specifically but was an abstract dealing with the deed of trust on Potomac Woods generally, including Lot 13T, from Clark-King to F. O. Day Company. The document specified the dates of releases as to a number of the encumbered lots, with significant silence as to Lot 13T.

Approximately seven additional items seized from the appellant's law office at 3700 Decatur Avenue also passed through all of the screens. One was a file labeled "Antonelli to Mt. Vernon to Young Contracting Company 72-242" and directly dealt with the deeds of trust on and the settlement of Lot 13T. Another file was marked "Clark-King to Antonelli 69-351 13(t)" and dealt exclusively with Lot 13T. One item was the ground trust from Clark-King to Equitable, which related to Lot 13T. One item was a grantor list of Clark-King. Another was a title abstract for the Potomac Woods subdivision. Another was a file showing Clark-King's transactions with the State National Bank.

All of these items fell clearly within the ambit of those particularly described "things to be seized" under the search warrants. The probable cause to believe that they were evidence of the false pretenses was well established. Nothing more is required.

Several other items seized, although not relating to Lot 13T specifically, showed a general pattern of operation on the part of the appellant with respect to unreleased deeds of trust on other properties in Potomac Woods and, therefore, negated any suggestion of mere mistake or lack of knowledge on his part when it came to his false representations as to Lot 13T. Because of their bearing on the critical question of the appellant's *mens rea*, we hold that they too were seizable evidence under the warrants. Alternatively, they were evidence of other crimes, their character as criminal evidence obvious to the searching party by the requisite standard of probable cause, and,

therefore, seizable warrantlessly under the Plain View Doctrine.

The appellant frames a final Fourth Amendment argument not in terms of those things 1) which were not suppressed and 2) which were admitted into evidence, but in terms of that much larger quantity of items which were seized initially but which did not pass through all of the screens. (A number of items which were not suppressed were not offered as evidence by the State because they related to other indictments against the appellant which had not yet come on for trial.) The short answer to the contention is that even if other items had been unconstitutionally seized, that frailty would not mandate the suppression of the items which were constitutionally seized. If the apples remaining in the barrel when it ultimately comes to rest upon the trial table are constitutionally healthy, it matters not how many constitutionally rotten ones were discarded along the way. As we said in *Spease and Ross v. State*, 21 Md. App. 269, 282-283, 319 A. 2d 560, 567-568:

> "Whether dealing with conversations or with tangible items, the issue is one of particularity — that language of the Fourth Amendment stating that the only valid warrants are those 'particularly describing . . . the things to be seized.' The classic case on point is *Marron v. United States*, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927). In that case, certain ledgers and other papers not particularly described in a search and seizure warrant were held to have been improperly seized under the warrant; other items which had been particularly described, however, were admitted into evidence. More recent applications of the *Marron* principle, mandating only the partial suppression of things wrongfully seized and not derogating from the admissibility of those things rightfully seized, are *United States ex rel. Nickens v. LaVallee*, 391 F. 2d 123 (2nd Cir. 1968); *United States v. Dzialak*, 441 F. 2d 212 (2nd Cir. 1971); and *Brooks v. United States*, 416 F. 2d 1044 (5th Cir. 1969).

The wiretap cases generally acknowledge the clear analogy to more general Fourth Amendment principles. *United States v. LaGorga, supra*, said, at 197:

> 'It seems clear under the general law of search and seizure that if some of the items obtained satisfy the requirements of the law, the mere fact that other objects beyond the permissible ambit of the search must be suppressed, does not require that all of the evidence must be necessarily so treated.' "

10. Compulsory Self-Incrimination

The appellant's tenth claim of error is based upon a curious combination of *Andresen v. Bar Association of Montgomery County*, 269 Md. 313, 305 A. 2d 845, and *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

The *Andresen* case, standing alone, is adverse to the appellant's Fifth Amendment claim. That opinion, written by Chief Judge Murphy, dealt with a court-ordered audit of this appellant's real estate settlement accounts. The petitioner for the court order was the Bar Association of Montgomery County. The petition recited the filing of the criminal information in this case on November 1, 1972, for false pretenses. It pointed out that the appellant had "acted as settlement attorney for the sale of properties from the Clark-King Construction Company (Clark-King) to enumerated homeowners in the Potomac Woods Subdivision," that "the transactions in question involv[ed] unreleased deeds of trust pertain[ing] to lots 12 (T), 13 (T) [the Standard-Young Associates lot], 14 (S), 15 (S) and 25 (R) [the Warfield lot] of the Subdivision," and that "many of the purchasers of properties in the Subdivision 'knew nothing of the named unreleased mortgages until the subject was revealed . . . to them [by the State's Attorney].' "

The appellant there maintained that to compel him to produce his accounts for audit was in contravention of his right against compulsory self-incrimination. The Court of Appeals relied upon the "required records doctrine" to avoid the self-incrimination problem. It held, at 269 Md. 327-328:

> "Although the facts in the instant case do not present the classic prototype of the required records doctrine — *i.e.*, a pervasive regulatory scheme with enforcement procedures, including periodic reporting or inspection of records required to be kept thereunder — we think them close enough in principle to warrant application of the doctrine. . . .
>
> [I]n the course of regulating transactions involving conveyancing of real estate, the Legislature passed Article 21, § 42, *supra* note 1, providing a limited right of audit 'of the accounts maintained by such person for funds received in connection with real estate closing transactions in this State.' Thus, by combination of court rule and statute, the records in the instant case are required to be kept subject to audit in the narrow circumstances outlined in Article 21, § 42.
>
> We think the ordered audit fits each of the *Shapiro* criteria enumerated above. First, the records required are, obviously, records customarily kept by lawyers, necessary to a proper accounting of monies held for others. Secondly, the records have 'public aspects' making them at least analogous to public records. They detail the use of monies which the lawyer holds for others in an area properly regulated by the State. In *State Real Estate Commission v. Roberts*, *supra*, the Supreme Court of Pennsylvania recognized that the escrow account records of a real estate broker were required records within the meaning of *Shapiro*."

It cited with approval *United States v. Silverman*, 449 F. 2d 1341, 1345 (2nd Cir. 1971):

> "Appellant's fifth amendment argument is equally without merit. Records required to be kept pursuant to a reasonable regulatory scheme have 'public aspects' and may be examined for evidence of criminal conduct."

Predicating its holding that the records were, indeed, *required to be kept* upon the combined effect of Article 21, § 42 (effective July 1, 1968) and Maryland Rule 1230 (effective November 2, 1970), the Court of Appeals limited the court-ordered audit to those "accounts maintained . . . for funds received in connection with real estate closing transactions in this state occurring on or after November 2, 1970, the effective date of Maryland Rule 1230." [3]

The only comfort the appellant may take from *Andresen* is by arguable negative implication. Some of the documentary evidence seized from the appellant antedates November 2, 1970. All of it involves other than escrow accounts — the precise thing subject to court-ordered audit in *Andresen* as a "required record."

The State's position, on the other hand, is that it proceeded exclusively on a Fourth Amendment basis, whereunder probable cause will justify a court's warrant to search for and to seize incriminating evidence, and not upon a Fifth Amendment basis, whereunder a suspect is required by subpoena to present for examination his records which *may* be incriminating. The appellant seeks to box the State into the Fifth Amendment corner by invoking the ghost of *Boyd v. United States*, *supra*. He hangs his hat on a passing reference in *Andresen*, at 269 Md. 323, which characterized *Boyd* as "a vintage case of continued vitality."

---

3. The Court did not reach the question of whether the required records doctrine could stand on one leg as opposed to the two legs available as of November 2, 1970, saying at 269 Md. 328, n. 8:

> "We need not reach the issue of whether either the statute or the rule, standing alone (*e.g.*, a non-lawyer disbursing funds under § 42 or a lawyer's use of client funds other than in the circumstances outlined in § 42) would warrant application of the required records doctrine, for, under the facts of this case, both were in effect on and after November 2, 1970, a time period during which the non-compliance with Article 21 § 42 was alleged and proved."

Boyd, as *Andresen*, dealt with producing business records under subpoena for a civil proceeding and not with a search and seizure situation based upon probable cause. It is still good law for the limited proposition that a man may not be compelled to produce the records of a testimonial nature which may incriminate him, subject only to the "required records" exception. The privilege not to be compelled to step forth and produce incriminating evidence against oneself has never been equated, however, with the right to foreclose the State from proceeding upon a judicially issued warrant, based upon probable cause, and particularly describing the place to be searched and the things to be seized. And see *United States v. Blank*, 459 F. 2d 383 (6th Cir. 1972), at 385:

> "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant."

For both its limited holding and as a rhetorical Fourth Amendment milestone — carrying the historic stream of consciousness from *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765) on to *Weeks v. United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) — *Boyd* is "a vintage case of continued vitality." Another part of *Boyd*, however — that relied upon by the appellant here — is a quaint anachronism of no current vitality. That is its so-called "mystic union of the Fourth and Fifth Amendments." That was a now outdated legal fiction by which justices and judges aggrieved at Fourth Amendment violations by the police could get around the absence of an exclusionary rule. By reading the Fourth Amendment violation as tantamount to compelled (and therefore forbidden) self-incrimination under the Fifth Amendment, exclusion was achieved. The notion was rendered obsolete in the federal courts by the adoption of an exclu-

sionary rule as part of the Fourth Amendment in *Weeks v. United States*, *supra*, in 1914, and in the state courts by *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081, in 1961. The divorce between the Fourth Amendment and the Fifth Amendment is now universally recognized. *Gilbert v. California*, 388 U. S. 263, 87 S. Ct. 1951, 18 L.Ed.2d 1178 (1967); *Schmerber v. California*, 384 U. S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966). *Marron v. United States*, 275 U. S. 192, 48 S. Ct. 74, 72 L.Ed. 231 (1927) involved the legitimate seizure of incriminating business records. The last surviving champion (other than the appellant) of the "mystic union between the Fourth and Fifth Amendments" was the late Justice Hugo Black (see his concurring opinion in *Mapp*), simply because he could not read the exclusionary rule into the words of the Fourth Amendment standing alone. Even under the "mystic union," the indispensable predicate was a Fourth Amendment violation in the first instance. Here there was none. Even if the "mystic union" still endured, which it does not, the appellant could not prevail. As was held in *State v. Bisaccia*, 213 A. 2d 185 (N.J. 1965), at 188:

> "No doubt the Fifth Amendment and the restraints in the Fourth seek to protect related values even though the nature and extent of the protection vary. So an attempt to use against a man things taken from him in violation of the Fourth Amendment could invite the question whether the Fifth was intended to shield him from it. Mr. Justice Black took that view of the Fifth in his separate opinion in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 1093 (1961); but it is not apparent how the Fifth Amendment can make illegal a search and seizure which the Fourth Amendment permits. The Fourth has its own expressed limitations upon 'search and seizure; there is no reason to suppose the framers of the Amendments intended to imply through the Fifth an additional limitation upon the Fourth."

The State here did all the investigative work; the appellant was not *compelled* to do anything.

11. The Prosecutor's Argument to the Jury

The appellant levels one charge at the prosecutor's closing argument to the jury and another at his rebuttal argument, the first a carefully directed shot, the second a broadside.

The state's attorney's closing argument to the jury ran to forty-five pages of transcript. In the course of placing final argument and jury deliberation in their appropriate posture in the context of the total trial, he said the following sentence, at page three of that argument:

> "The evidence is before you now, because as a matter of law in this State, the Court has ruled that there is sufficient evidence by which you can find the defendant guilty of the counts with which he remains charged at this point."

Without making anything further of the point, the state's attorney went on to explain the various counts which the jury was to consider. Two pages further along in the transcript of argument, an unrelated break occurred, apparently to permit a juror to exercise a point of undesignated personal privilege:

> "JUDGE BARRICK: Excuse me. Are you having a problem?
>
> JUROR: No, not really.
>
> JUDGE BARRICK: The jury will be excused and may retire to the jury room.
>
> The Court thereupon recessed, at 1:42 o'clock p.m., and reconvened at 1:55 o'clock p.m."

The appellant seized upon the break to level an objection:

> "MR. LAMB: Your Honor, I don't mean to be picky, but I would have to register a strong objection at this time regarding Mr. Werner's comment that Your Honor found sufficient

> evidence to go to the jury. I think this is highly objectionable and is grounds for a mistrial if the jury now considers that there is sufficient evidence in this case — that's not proper argument to the jury.
>
> MR. WERNER: The jury is the judge of the law, and the law of the state says there must be sufficient evidence before they can determine — Mr. Lamb can argue that.
>
> THE COURT: Well, I'm not going to declare a mistrial, but I am going to suggest to the State that you not use that any more."

We see no abuse of discretion in not granting a mistrial. The mere passing reference in this case in a single sentence — without fanfare or highlighting — to a point of, at most, peripheral significance is simply of no consequence.

The broadside is aimed at the state's attorney's rebuttal argument. That argument ran to seventeen pages of transcript and generated no timely objections. The following occurred after the jury had entered upon its deliberations:

> "(Bench conference out of presence of jury, after jury had retired to jury room following completion of arguments, at 5:07 o'clock p.m., May 29, 1973)
>
> MR. LAMB: Your Honor, I did not object during Mr. Werner's rebuttal, but I strongly object to the scope and substance of the rebuttal argument with respect to his castigating me and calling me a liar to the jury; in effect playing on the jury's — harping on the fact that he as a lawyer is held to a higher standard than anybody else in this jurisdiction. I thought his entire rebuttal argument was wholly improper.
>
> THE COURT: Well, it's a little late to object to it not — there's nothing I can do about it now. But quite frankly, I thought, if you want to know the truth about the situation, that arguments in all

three respects — of all three lawyers could have been objected to in certain respects.

MR. LAMB: I recognize that, Your Honor —

THE COURT: I think it's bad when you get into personalities and when particularly you refer to it as what I think the case is. It's unimportant as lawyers what we think of the cases; it's what the evidence is to prove, and we shouldn't inject ourselves into it personally, and that goes to all three of you, I think. The Court will recess until after the jury returns."

Initially, we agree with Judge Barrick that objection came too late. *Holbrook v. State*, 6 Md. App. 265, 250 A. 2d 904, offers no support for the appellant's position that the jury should have been returned to the courtroom for a curative instruction. In that case, the objection, though not made when the offending remark was uttered, at least came after the speech was over but before the jury had retired. Moreover, we see no merit in the complaint, even ignoring its staleness. The two generalized grievances made to Judge Barrick are here supplemented by a bill of particulars listing thirty-two alleged improprieties. The first seventeen curiously were not even part of the rebuttal to which the tardy objection was made, but were a part of the initial closing argument. We have reviewed the rebuttal argument at length and find it unexceptionable in all regards. At the end of a hard-fought and terribly complicated trial, each of two highly competent advocates attempted so to marshal the facts and arguable inferences as to put his own case in the best possible light and his opponent's in the worst possible light. That is the quintessential function of argument. That a counterpunching prosecutor, in rebuttal, twice characterized the closing defense argument as having "deliberately misrepresented" facts and having deliberately misled" the jury, when it argued that the deeds of trust were simply mechanic's liens, is not unduly unrestrained. Nor is the peroration, "The facts have been distorted; have been distorted terribly; have been distorted desperately." Neither

do we find inappropriate the argument that a lawyer, entrusted by clients with their money and their legal fortunes, is, indeed, held to a higher trust and degree of responsibility than those who cannot and do not take on fiduciary obligations. The attack upon the rebuttal is both too little and too late.

12. Jury Instructions

Under another umbrella contention, the appellant claims that the trial judge committed reversible error in nineteen different respects. These nineteen subcontentions break into two major categories. With respect to seven of them, specific objections were lodged and preservation for appellate review is clear. With respect to twelve others, no objections were registered at the trial level and the appellant falls back upon the defensive line of "plain error."

Specific Objections:

a. Allusion to Failure of Appellant to Testify

In instructing the jury as to the fraudulent intent element of false pretenses, the court said:

"Since intent is subjective and without the cooperation of the accused cannot be directly or objectively proven, its presence must be shown by establishing facts which permit a proper inference of its existence."

Out of the phrase "without the cooperation of the accused" the appellant reads the instruction as an unfair comment upon the fact that the appellant did not take the stand in his own defense. We simply cannot read the instruction as doing any such thing. The necessity to infer an internal *mens rea* from external conduct absent some confession of criminal intent is ever present. The necessity to infer such an element is a constant whether a defendant stays off the stand or takes the stand to offer self-serving denials of criminal intent.

b. Simultaneity between Making False Representation and Obtaining of Chattel, Money, Etc.

The appellant objected to the following instruction:

> "The thing obtained need not be in existence at the time of the making of the pretense, in order to be said to have been obtained thereby."

He cites no authority and develops no argument to substantiate his position. The propriety is clear. A victim could obviously part with newly acquired monies or chattels on Tuesday in reliance upon a false representation made on Monday before those monies or chattels had come into his hands. There is no necessity that the act of falsely representing and the act of obtaining be simultaneous. The factual referent for this whole point was that the sum of money actually defrauded was not ascertainable at the time of the false representations, but only became fixed when the appellant determined how much to hold back by not applying it to proper purposes.

The appellant also objected that the immediately following instruction, unexceptionable on the merits, was twice repeated by the judge. The point is without merit. *Ager v. Baltimore Transit Co.*, 213 Md. 414, 423, 132 A. 2d 469; *Marlow v. Cerino*, 19 Md. App. 619, 626, 313 A. 2d 505.

c. Extraterritoriality of Persuasive Common Law Authority

The appellant challenges three statements about the law of false pretenses not on their merits but upon the exclusive ground that the principles stated to the jury came from *Wharton's Criminal Law*, 2 *American Jurisprudence*, and *Corpus Juris Secundum*, respectively, and had not been adopted verbatim by Maryland decisions. It is not necessary

to belabor the bedrock characteristic of the Anglo-American legal tradition that the vast experiential reservoir of the entire common law world is available as persuasive authority to fill the gaps and interstices in our own recorded legal expressions. A judge who ignored so rich and resourceful a library would be derelict.

d. Use of the words "or to the use of another"

The appellant objects to the instruction on the elements of embezzlement and larceny after trust to the effect that the conversion could be "to one's own use *or to the use of another.*" Without reflecting on the merits, we simply note that the point is moot since guilty verdicts were not returned on any of the embezzlement or larceny after trust counts.

e. The Failure to Instruct on Immel v. State

The appellant takes umbrage at the failure of the trial court to instruct on the basis of *Immel v. State*, 228 Md. 566, 180 A. 2d 703. We agree with the trial judge that *Immel* was inapposite. *Immel* dealt with a situation where a defendant obtained a bank credit to his account on the basis of a false pretense, but never drew upon the account so that the bank never parted with title to anything. That factual pattern had no analogue in the present case. Its only arguable significance, over, was to the false pretense charges against the Title Insurance Company of Minnesota, the convictions on which we have overturned for other reasons.

f. Elements of Fraudulent Misappropriation by a Fiduciary

The appellant now claims that he objected to the failure of the trial court to define the elements of the crime of fraudulent misappropriation by a fiduciary, although he admits that his objection was "inartfully worded." That is the most artful of

understatements, since the confrontation consisted only of the following:

> "THE COURT: ... As far as the other objections are concerned, there are certain instructions that I gave the jury that have not come from case law, necessarily, Maryland case law, but in order to apprise the jury of the requirements under the various counts, I think it is necessary to explain to them the elements of the crime that needed to be proven, and sometimes you can't find that particular element defined; therefore you've got to go elsewhere.
>
> MR. LAMB: I would submit that that would be where the judge is the determiner of the law, but in Maryland the jury is the finder of facts."

We cannot glean the remotest "inartful" suggestion of the objection now being pressed. The judge had, moreover, read to the jury the full text of Article 27, § 132.

g. Failure to Instruct under Roderick and Gordon

The appellant had filed a written request for instructions whereunder he urged several direct quotations from *Roderick v. State*, 9 Md. App. 120, 262 A. 2d 783, and *Gordon v. State*, 5 Md. App. 291, 246 A. 2d 623. The judge did not read those quotations directly. We see no error. *Roderick* was a non-jury case involving a conviction for larceny after trust. There were no convictions on the larceny after trust counts in this case. *Gordon* was an embezzlement case. There were no convictions on the embezzlement counts in this case. The charge actually given by Judge Barrick, moreover, fully and competently spelled out all of the necessary elements of larceny after trust, of embezzlement, and of fraudulent misappropriation by a fiduciary.

Alleged Plain Errors:

The appellant raises twelve additional assignments of error which were not objected to below but which he now alleges are noticeable under Maryland Rule 756 g as plain error.

h. Failure to Instruct that Opening and Closing Arguments are not Evidence

i. Failure to Instruct that Jury Could Not Determine Law from Arguments of Counsel

j. Failure of the Court to Summarize the Testimony

Without reflecting on the merits of any of the above, it is enough to notice that even if there had been error in not giving such instructions, the errors would have been of omission and not of commission. Our position with respect thereto was ably put by Judge Powers in *Brown v. State*, 14 Md. App. 415, 422, 287 A. 2d 62:

> "[W]e think that as a general guide, we may say that under Rule 756 g we will take cognizance of and correct an irremediable error of commission, but not an error of omission. Of course, the error must be plain, and material to the rights of the accused, and, even then, the exercise of our discretion to correct it should be limited to those cases in which correction is necessary to serve the ends of fundamental fairness and substantial justice.
>
> The omission here was one which the trial court could have, and undoubtedly would have, supplied by a supplementary instruction if appellant had requested it before the jury retired to consider its verdict. *Reynolds v. State, supra*. It does not call for us to correct it now."

k. The "Allen Charge" as Part of the Initial Instruction

Not simply was there no objection to this charge

having been given, but it was, moreover, concededly proper under *Kelly v. State*, 16 Md. App. 533, 298 A. 2d 470, affirmed by *Kelly v. State*, 270 Md. 139, 310 A. 2d 538. The *Kelly* case, furthermore, made clear that it was not error to give the "Allen Charge" as a part of the initial instructions to the jury, rather than holding it back to "dynamite" a deadlock.

l. Failure to Define "Most Important Affairs"

No objection is now made to the general instruction on reasonable doubt other than that in the course thereof, the judge did not further define the words "most important affairs." That is clearly a matter of omission and not of commission.

m. Failure to Instruct as to the Law of Escrow Accounts

This, again, is palpably a matter of omission and not of commission.

n. Instructions as to "Fiduciary" and "Misappropriation" Incomplete

The fault, if any, was one of omission.

o. Instructions as to Agency and Opinion

The appellant makes the bald allegation that the "instructions as to agency and opinion were misleading without reference to the facts." He does not specify how they were misleading. As we have pointed out, the trial judge is not required to review the facts. Nor is he required to give instructions on his own motion. *Wilson v. State*, 239 Md. 245, 210 A. 2d 824.

p. Obtaining "Any Sum" as an Element of False Pretenses

Contrary to the appellant's position, value is of no moment in making out a case of false pretenses, provided the goods obtained be of some value. *Polisher v. State, supra. Benjamin v. State*, 9 Md. App. 373, 264 A. 2d 490, relied on by the appellant, is inapposite. The fatal variance in that case was

between an allegation that two thousand dollars of current money had been received and proof which showed that no money had been received, but only the security of a bail bond. See also *Urciolo v. State, supra*, wherein we held that there was no meaningful variance between an allegation that $7,500 had been embezzled and proof that $1,788 had been embezzled.

q. Repetition of Instruction as to the Difference Between a Mere Legal Opinion and a False Representation

The appellant here does not practice what he preaches, repeating the contention we disposed of in dealing with the latter part of subcontention b above.

r. Instruction as to Detriment

The appellant claims that the judge erroneously instructed the jury that there is no necessity that the victim suffer loss as an element of false pretenses. The actual instruction was that there is no necessity that the victim suffer *pecuniary* loss so long as he has suffered some detriment. That is a correct statement of the law. *Polisher v. State, supra.*

s. Instruction as to Personal Benefit to Perpetrator

The appellant claims that the judge incorrectly instructed that there need be no element of gain to sustain a false pretenses charge. The actual instruction was that it was not necessary that the perpetrator of the false pretenses derive any personal benefit from his misrepresentation. This, again, in an accurate statement of the law. *Polisher v. State, supra; Baskerville v. State, supra.*

13. Corroboration of "Accomplice" Melvin Clark

We will accept, *arguendo*, the appellant's position that Melvin Clark was an accomplice, whose testimony needed to be corroborated in order to sustain a conviction. The

appellant sharpens his focus to the element of the wrongful misappropriation on the three charges of fraudulent misappropriation by a fiduciary. It is enough to point out that the failure of the appellant to apply the purchase money received at the respective settlements to obtain the releases of preexisting deeds of trust on the Pollitt, Warfield and Holtzclaw lots is corroboration enough. To begin to catalogue the further massive corroboration would be to reiterate the great bulk of an already intolerably long opinion.

14. The Admissibility of Clark's Testimony

The appellant's attack upon the testimony of Mel Clark is frenzied and diverse. An agreement was entered into between Clark and the State's Attorney's Office on October 31, 1972, whereby Clark agreed to testify as a State's witness and the State agreed not to proceed against Clark criminally. The appellant claims initially that the agreement was "illegal" under *Bowie v. State*, 14 Md. App. 567, 287 A. 2d 782. *Bowie*, of course, did not hold that an immunity agreement is "illegal" but simply that it might not have binding legal effect. The point is irrelevant in any event, since the problem (if any) is that of Clark and not that of the appellant. It is not for the appellant to assert some arguable Fifth Amendment privilege for Clark. Clark was a competent witness. His agreement with the State was made known to the jury, and they could make of it what they would in assessing his credibility and weighing his testimony.

The appellant next argues that the use of Clark as a witness violated the attorney-client privilege. It is enough to point out that the privilege flows from the attorney to the client and not vice versa. The right to insist that confidential communications between attorney and client not be divulged rests exclusively in the client. The client is always free to divulge such communications. *Lanasa v. State*, 109 Md. 602, 617-618, 71 A. 1058.

The appellant goes on to contend that the grant of immunity to Clark was not made known to him and that this

amounted to the employment of Clark by the prosecutor "as a spy to gain information in breach of the confidence of an attorney-client relationship" for a seven-month period. This charge has no factual basis. Clark testified that he terminated his attorney-client relationship with the appellant in 1972. The record reveals no contact between Clark and the appellant after October 31, 1972. The testimony of Clark, here in issue, is all as to events antecedent to October 31, 1972. The charge made by the appellant is, therefore, irrelevant to the issue.

The appellant claims that the failure of the State to inform him of the immunity agreement until the time of trial amounted to an unconstitutional suppression of evidence under *Brady v. Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). The immunity agreement, we hold, was simply not exculpatory and material evidence within the contemplation of *Brady*, nor was it suppressed within the contemplation of *Brady*. *Moore v. Illinois*, 408 U. S. 786, 92 S. Ct. 2562, 33 L.Ed.2d 706 (1972); *Younie v. State*, 19 Md. App. 439, 311 A. 2d 798. The appellant complains additionally that Maryland Rule 728 was violated when the State did not disclose this document to him in response to his request for all documents which the State intended to introduce at the time of trial. Aside from the fact that non-compliance with Rule 728 carries no exclusionary sanction, *Jackson v. State*, 8 Md. App. 260, 259 A. 2d 587, the appellant asked for no delay to study the document. Obviously, none was needed. The appellant, indeed, did not object to the introduction of the immunity agreement. It was helpful to him, not harmful. The appellant's vain hope, for which he cannot find even arguable authority, was to suppress the entire testimony of Clark and not the mere documentary corroboration of the testimony that Clark was appearing for the State pursuant to a grant of immunity.

The appellant contends that after October 31, 1972, he was entitled to *Miranda* warnings on whatever occasions Clark engaged him in conversation. The point is moot, since no such conversations were introduced in evidence.

The appellant does not explain how his Fourth and Sixth Amendment rights were violated by Clark's testimony, and we cannot imagine how they were.

The appellant's final point in this regard is even more of a flight from reality, as reality is tied for purposes of appellate review to the trial record. He argues at one point:

> "(It is significant that the investigation of appellant was carried out by virtue of an LEAA grant and that Clark's brother-in-law is Henry E. Peterson, Deputy Attorney General of the United States in charge of the Criminal Division.)"

He argues again:

> ". . . this Court stated that the *Miranda* warnings must be given when 'questioning (is) initiated by law enforcement officials' (which Clark was at the time, his brother-in-law also being Deputy Attorney General of the U.S. Department of Justice which funded the prosecution.)"

There is no shred of allusion in the record to such irrelevant whispers. Such flagrant and insinuating injection of extraneous fact is highly reprehensible as an appellate practice. We register the sternest disapproval.

15. The Use of Allegedly Perjured Testimony

The appellant claims that the testimony of Norman Hecht, a vice president of the Madison National Bank, was perjured and that the State knowingly used such perjured testimony.

The controversy swirls essentially about Hecht's testimony that the appellant and Clark-King had not paid off the debt secured by the so-called Lumsden trust. Clark-King owed two debts to the Madison National Bank. The bank had applied several payments by Clark-King to the other debt and not to the one secured by the Lumsden trust. The bank and Mr. Hecht believed that it was the prerogative of the creditor to designate the allocation of payments where

the creditor holds more than one note. This conclusion by Hecht was reflected in his trial testimony.

Two months after the trial had been concluded, the Court of Appeals handed down its decision in *Clark-King Construction Co. and Andresen v. Salter, et al., supra.* Judge Miller, in the Circuit Court for Montgomery County, had ratified a foreclosure sale upon the same principle as that relied upon by Hecht and the bank. The Court of Appeals reversed his order of ratification and held that the option of allocating payment to one debt or another is in the debtor and not in the creditor.

Out of those strands, the appellant spins his theory that Hecht was a "liar" and that his testimony at this trial, based upon his then current beliefs, was "perjury." His belief in the propriety of his then legal theory, even though later overturned by the Court of Appeals, was no more "perjured" than was the decision by Judge Miller to ratify foreclosure, relying upon the same legal theory, "perjured."

The appellant captures the State in the web of "knowingly using perjured testimony" with two strands. He points out that the Court of Appeals in *Clark-King* relied in part upon the testimony of Frank Marsalek, whose position was opposed to that of Hecht. He further points out that the State, in preparing for this trial, had the benefit of Frank Marsalek's opinion and should, therefore, have reached the same conclusion that the Court of Appeals ultimately reached. He buttresses that position by quoting from Judge Barnes' decision to the effect that his conclusion was based upon "well established law" and then charges the prosecutor, as "an attorney at law," with "knowledge of or at least inquiry into 'well established law.' "

Without attempting to dissect in detail so imaginatively spun a theory, we simply hold that it has not been demonstrated to us that the testimony of Hecht was in any way perjured, *State v. Devers*, 260 Md. 360, 272 A. 2d 794, let alone that the State knowingly used perjured testimony so as to require a reversal of the convictions.

16. Denial of Motion for Continuance

It is settled that the grant or denial of a continuance lies within the sound discretion of the trial court. As we held in *Nichols v. State*, 6 Md. App. 644, 646, 252 A. 2d 499:

> "To show an abuse of discretion and prejudice for failure to continue a case because of the absence of a witness, the party requesting the continuance should show that the evidence of the absent witness was competent and material, that he believed the case could not be fairly tried without the evidence, that he had made diligent and proper efforts to secure the evidence, and that he had reasonable expectation of securing the evidence within some reasonable time."

A hearing was held before Judge Barrick on May 14, 1973, on the motion for a continuance. By agreement, the transcript was referred to Judge Robert E. Clapp, Jr., the administrative judge. Judge Clapp denied the motion, stating in pertinent part:

> "The complicated nature of the trial has been obvious since the filing of the indictment and the defendant has had ample time for any required preparation. The arguments of counsel do not present any extraordinary cause for postponement as required by the above Section 591 [of Article 27]. Permission for the postponement is therefore denied."

We see no abuse of discretion. Charges had been pending against the appellant since November 1, 1972, seven months before trial. It is evident from the trial record that appellant's counsel was intimately familiar with every nuance of this complex series of events, with the law pertaining thereto, and that he afforded the appellant a superlative defense.

17. Denial of Motion for Severance

Much of the background necessary to understand this terribly complex set of facts was common to all of the charges. Any one incident, moreover, would probably have been relevant at the trial of any of the other incidents, to show a general pattern and scheme of conduct and to negate the defense, plausible enough in a single case, of mere careless mistake. We hold that Judge Barrick did not abuse his discretion in concluding:

> "It seems to me that there is sufficient evidence as to these alleged crimes that they are related in such a way that they tend to show a scheme or intent, motive, and I do believe that at this stage, although I am not ruling on it specifically, that the evidence presented on any one of the counts can be introduced as evidence to show motive, scheme or plan as to other counts; therefore I think they should not be severed but tried together."

See *Baumgartner v. State*, 21 Md. App. 251, 255-256, 319 A. 2d 592.

18. Ostensibly Irrelevant Evidence

The appellant challenges the relevance of State's Exhibit 59, a homeowner's policy issued to Antonelli and Caniglia in 1969. We hold that it was very relevant. It dealt specifically with Lot 13T. It helped to establish that Lot 13T was already encumbered by two deeds of trust but that the appellant, as settlement attorney for the 1969 sale to Antonelli and Caniglia and as the person responsible for the issuance of the title insurance policy, did not then reveal the existence of the two deeds of trust. It had a direct bearing on the later history of Lot 13T, on the knowledge of the appellant as to the condition of the title to Lot 13T specifically, and as to the appellant's general *modus operandi*.

19. Admissibility of Testimony of Carl Zentz

Carl Zentz had worked for the appellant for three and one-half years as a law clerk and title examiner. He had been

graduated from law school one week before the trial. As Zentz was being called to testify, the appellant sought vicariously to assert the Fifth Amendment privilege against compulsory self-incrimination for him. Judge Barrick ruled properly that the privilege was that of the witness alone and not of the appellant.

Early in his testimony, Zentz inquired of the court whether he was required to testify, asserting an attorney-client privilege. The court ruled, again quite properly, that there was no such privilege in this case.

The appellant now urges upon us *Morris v. State*, 4 Md. App. 252, 242 A. 2d 559, and *Bieber v. State*, 8 Md. App. 522, 261 A. 2d 202, which hold that the attorney-client privilege extends to the employees of the attorney as well. As both *Morris* and *Bieber* make clear, however, the privilege is that of the client and not of the attorney. The principle, not here relevant, is simply that a client is secure in his confidential communications made to his attorney or to the employee of his attorney. The only clients remotely involved even with the subject matter of Zentz's testimony were Mel Clark, George Young and Robert Holtzclaw, all of whom had appeared voluntarily for the State and none of whom were asserting any attorney-client privilege as to the appellant or his office.

The privilege, moreover, goes only to confidential communications. McCormick, *The Law of Evidence* (1954), Ch. 10, "The Client's Privilege: Communications between Client and Lawyer," § 93, "Subject-Matter of the Privilege — (a) Communications," pp. 186-188; 8 Wigmore, *Evidence* (McNaughten rev. 1961), Ch. 82, "Communications between Attorney and Client," § 2306, "Communications distinguished from acts," pp. 588-591. The testimony of Zentz did not relate, directly or indirectly, the conversations or communicative acts of anyone.

He described the general set-up of the appellant's filing system. He explained that a general basic file dealt with a whole subdivision and showed its state of title, encumbrances, releases, etc. He testified as to his work with

and periodic updating of (by checking courthouse land records) the basic file on the Potomac Woods subdivision. He pointed out where his own notes and title abstracts revealed that several of the deeds of trust, relevant in this case, had not been released as of the respective settlement dates.

Even absent the controlling fact that the privilege is the client's and not the attorney's, there was nothing in Zentz's testimony as to any confidential communications from clients within the contemplation of the privilege.

20. The "Best Evidence Rule"

In making this contention, the appellant has utterly misperceived the function and utility of the "best evidence rule." The thrust of his contention is that the crime of fraudulent misappropriation by a fiduciary requires "proof of an appropriation not in the lawful execution of the trust imposed on the fiduciary"; that all funds were disbursed by checks written on the appellant's escrow accounts; and that the "best evidence" of the misappropriation was, therefore, the checks themselves. He makes a similar argument with respect to the false pretenses counts: that the "best evidence" of the falseness of the representations as to state of title was such documentary originals as "notes, deeds of trust, releases and statements of account."

The entire contention is framed in the context of the appellant's motion for judgments of acquittal, since no timely objections were made, in this regard, at the time of the introduction into evidence of the various items of allegedly "secondary" or "less than best" evidence.

The "best evidence rule," of course, has nothing to do with how the State (or any other party to a case) proves any element of its case but only with how it proves the contents of a document. If the State wishes to prove the terms of a document, it must, where possible, produce the document itself. See 4 Wigmore, *Evidence* (Chadbourn rev. 1972), § 1174, " 'Best Evidence' principle (continued): Scope of the phrase," p. 400:

"The phrase about 'producing the best evidence,'

then, has long been nothing more than a loose and shifting name for various specific rules. Each of these stands upon its own basis of principle, and each of them has its own history, independent of the phrase. The rules were not created by deduction from the principle implied in the phrase; but the phrase came to be used as descriptive of the rules already existing. What were these rules?

(1) Chiefly, and usually, the phrase was employed for the rule that the terms of a document must be proved by the *production of the document* itself, in preference to evidence about the document (§§1177-1282 *infra*). This is the use that has longest survived, and its illustrations are too numerous to need citation."

And see McCormick, *The Law of Evidence* (1954), Ch. 23, "The Requirement of the Production of the Original Writing as the 'Best Evidence,'" § 197, "The Reason for the Rule," p. 410:

"The policy-justification for the rule preferring the original writing lies in the facts (1) that precision in presenting to the court the exact words of the writing is of more than average importance, particularly as respects operative or dispositive instruments, such as deeds, wills and contracts, since a slight variation in words may mean a great difference in rights, (2) that there is a substantial hazard of inaccuracy in the human process of making a copy by handwriting or typewriting, and (3) as respects oral testimony purporting to give from memory the terms of a writing, there is a special risk of error, greater than in the case of attempts at describing other situations generally. In the light of these dangers of mis-transmission, accompanying the use of written copies or of recollection, largely avoided through proving the terms by presenting the writing itself, the preference for the original writing is justified."

And see *Wells v. State*, 8 Md. App. 510, 518, 261 A. 2d 181; *Davis and Napier v. State*, 7 Md. App. 667, 670, 256 A. 2d 819; and *Duggins v. State*, 7 Md. App. 486, 488-490, 256 A. 2d 354:

In this case, the State simply did not offer the contents of any documents via the handwritten or typewritten notes or via the oral recollection of one who had observed those documents. The "best evidence rule" was not in any fashion involved.

21. Reservation of Question for Court En Banc

The hearing on the motion to suppress physical evidence was concluded on April 12, 1973. On April 19, 1973, Judge Barrick filed a written Memorandum and Order deciding the motion. A copy was mailed to appellant's counsel. On May 4, 1973, the appellant filed "Exceptions to said Order of Court and a Reservation of question for the Court En Banc pursuant to Article IV, Section 22 of the Constitution of Maryland and Maryland Rule 510." At a hearing on this and a number of other motions on May 14, 1973, the matter was taken under advisement. On May 21, 1973, immediately before the trial began, the motion was renewed and again taken under advisement. On May 30, 1973, just prior to the reception of the verdict, the court declined to reserve the question for the court en banc on the ground that the motion had not been timely filed.

Art. IV, § 22, of the Maryland Constitution, provides:

"Where any Term is held, or trial conducted by less than the whole number of said Circuit Judges, upon the decision or determination of any point, or question, by the Court, it shall be competent to the party, against whom the ruling or decision is made, upon motion, to have the point, or question reserved for the consideration of the three Judges of the Circuit, who shall constitute a court in *banc* for such purpose; and the motion for such reservation shall be entered of record, during the sitting, at which such decision may be made; and the several Circuit Courts shall regulate, by rules,

the mode and manner of presenting such points, or questions to the Court in *banc*, and the decision of the said Court in *banc* shall be the effective decision in the premises, and conclusive, as against the party, at whose motion said points, or questions were reserved; but such decision in *banc* shall not preclude the right of Appeal, or writ of error to the adverse party, in those cases, civil or criminal, in which appeal, or writ of error to the Court of Appeals may be allowed by Law. The right of having questions reserved shall not, however, apply to trials of Appeals from judgments of Justices of the Peace, nor to criminal cases below the grade of felony, except when the punishment is confinement in the Penitentiary; and this Section shall be subject to such provisions as may hereafter be made by Law."

As was recognized by Chief Judge Brune in *State Roads Commission v. Smith*, 224 Md. 537, 540, 168 A. 2d 705, "Review by a court *in banc* in the counties in a procedure long authorized, but rarely used." As to the party making the motion, "a reservation of points or questions for consideration by the Court en banc is a substitute for an appeal to the Court of Appeals." *Buck v. Folkers*, 269 Md. 185, 187, 304 A. 2d 826.

In *Costigin v. Bond*, 65 Md. 122, 3 A. 285, certain exceptions were taken to rulings on jury instructions on May 31, 1885. On April 2, 1885, two days later, the aggrieved party moved to have the question reserved and considered by the court en banc. The Court of Appeals held that the motion came too late, strictly construing "sitting" to mean the very day on which the adverse ruling was made. It said, at 65 Md. 124:

> "This proceeding is in substitution of an appeal to the Court of Appeals, and makes a considerable alteration in the law on this subject. The change is not to be extended by construction beyond the terms of the Constitution. It is provided that the

> motion for a reservation of the point or question decided shall be entered of record during the sitting at which the decision may be made. The word 'sitting' is not synonymous with 'term' of the Court. The exception to a ruling must properly be taken as soon as the ruling is made but this provision of the Constitution intended to give the party taking an exception the entire sitting of the Court (that is the whole time until the Court adjourned for the day) to determine whether he would have his appeal to the Court *in banc*, or to the Court of Appeals. It would be a very improvident construction of this section to hold that a party might have the whole term of the Court to make up his mind; and we think it was not warranted by the plain meaning of the words. As the motion was not entered of record during the sitting at which the ruling was made, the Court *in banc* had no jurisdiction of the appeal. As the ruling of the Court *in banc* was made exclusively on the bills of exception, our decision refers only to them."

Since the Memorandum and Order of Judge Barrick here in question was mailed to appellant's attorney on April 19, we cannot say that Judge Barrick was wrong in concluding that the filing of the Motion to Reserve the Question for the Court En Banc on May 4, fifteen days later, was not accomplished "during the sitting, at which such decision" was made, even if allowance is made for receiving the ruling by mail. (The appellant makes no claim that the mailed order did not promptly arrive.)

22. Admissibility of Testimony of John C. Connally

John C. Connally was the Senior Vice President for the Title Insurance Company of Minnesota. A reading of his testimony does not reveal that he was offering opinion evidence "as an expert," as the appellant now alleges. He testified merely as to the manner in which his company did business with the appellant. He also explained several

portions of a title insurance policy issued by his company. His testimony was not improper.

23. Coercion of Jury into Reaching a Verdict

The gist of this contention was the giving of the "Allen Charge" to the jury. We have already discussed that issue in dealing with contention 12(k) above. The appellant, however, broadens this contention that "the jury was coerced into returning a verdict" by pointing to the cumulative effect of the "Allen Charge" (given during the regular jury instructions) and two other factors. He refers to "the hour of the day" and the fact that "the jury was sent off at the end of a normal working day in their lives." The jury actually retired to begin its deliberations at 5:07 P.M. We find that in no way remarkable or "coercive," standing alone or in combination with other factors. The very reference, outside the record, to the third factor, we find inexcusable. (See contention 14 above.) The appellant recites in his brief:

> "The effect of the Court's parting charge and the hour of the day, together with the *information received that the jury was told that they could not leave until they reached a decision (which does not appear in the record)* gives credence to the proposition that the jury departed on its deliberation under threat of coercion." (Emphasis added)

The appellant goes on with his unsupported (and therefore unrebuttable) accusations:

> "Less than three quarters of an hour later, just after midnight, the verdict was returned. It has also since been learned that during this short period of time the jury did not know how to react, did not understand their function, the law or the facts and simply decided to reach a majority verdict as soon as possible, lest they stay all night, and decided if their decision was wrong that it would be corrected by an appellate court."

Not simply is the point without merit, but the making of it is unconscionable appellate practice.

24. Effective Assistance of Counsel

This contention that the appellant's counsel "was so utterly ineffective in preparation of the defense that appellant was denied genuine and effective representation" is perhaps "the most unkindest cut of all." The easy answer is that the point was not raised below and is, therefore, not properly preserved for appellate review. Maryland Rule 1085; *Harris v. State*, 2 Md. App. 408, 234 A. 2d 781. After lengthy review of this entire record, however, it behooves us to observe that appellant's counsel evidenced superb preparation in his detailed familiarity with the facts and the law (see contention 16 above) and that he conducted a bitterly-fought, last-ditch defense on every peripheral as well as central point. The cross-examination was thorough. The jury presentation was expertly organized and executed. The Sixth Amendment never contemplated more.

25. Denial of Judgments of Acquittal

We have already discussed the legal sufficiency of the evidence in dealing with contentions 2 and 4 above. The appellant complains additionally that the judge himself applied the wrong test when he indicated that "the ruling I made on motions that were previously submitted was based on my reviewing of facts most favorable to the State; and so that there is no mistake about that, that is the test that I used."

As we have repeatedly pointed out, in a jury trial, the test as to whether the evidence was sufficient in law to permit the trial judge properly to deny the appellant's motion for a judgment of acquittal and to submit the case to the jury is whether the admissible evidence adduced at the trial either showed directly, or circumstantially, or supported a rational inference of, the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt, of the appellant's guilt of the offense charged. *Williams v. State*, 5

Md. App. 450, 459, 247 A. 2d 731; *Metz v. State*, 9 Md. App. 15, 23, 262 A. 2d 331.

We see nothing inconsistent between that law and the position taken by Judge Barrick. Since the jury, as the ultimate assessor of credibility and weigher of evidence, was free to accept the witnesses and permissible inferences most favorable to the State's cause, Judge Barrick was required to look at the evidence in the light most favorable to the State and to see whether it was legally sufficient.

The appellant's throw-away subcontention that the submission of six embezzlement and larceny after trust counts to the jury, notwithstanding the fact that "the evidence was so lacking in this regard that the State virtually abandoned these counts in its closing argument" somehow "precluded [him] from taking the witness stand in his defense" is the naked assertion of a conclusion weirdly unconnected with its premises and defying the imagination even to concoct an arguable rationale.

26. The Motion for a New Trial

The appellant filed a motion for a new trial which was denied after a full hearing on October 5, 1973. Although he there pressed eight reasons for granting his motion, he now relies solely on the ground of newly discovered evidence. The newly discovered evidence he proffered was the Court of Appeals decision in *Clark-King Construction Co. and Andresen v. Salter, et al., supra* (see contention 15 above), which was handed down on July 20, 1973, after the trial in this case had been concluded.

The controlling law on newly discovered evidence as a ground for a new trial was well stated in *Jones v. State*, 16 Md. App. 472, 477, 298 A. 2d 483:

> "It is, of course, well established that the granting or denial of a motion for a new trial lies within the sound discretion of the trial court and the action of the trial court upon such a motion will not be disburbed on appeal except under the most extraordinary and compelling reasons .... On the

question of newly or after discovered evidence, it has been said:

> 'There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, *i.e.*, discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.' *Johnson v. United States*, 32 F. 2d 127, 130 . . .
>
> It is essentially the function of the trial judge to evaluate and assess the newly discovered evidence and where such evidence consists of testimonial evidence from a witness allegedly discovered after the trial has been concluded, it is for the trial judge to determine the materiality and the credibility of such testimony. Unless it should appear that the trial judge's findings of fact were wholly unsupported by the record and, thus, clearly erroneous, his findings will not be disturbed on appeal . . ." (Citations omitted)

We do not consider the Court of Appeals decision in *Clark-King* to be newly discovered evidence. Its legal holding was simply to the effect that, absent an agreement as to allocation, the option is in the debtor to allocate his payments where two or more debts are owing the same creditor. That is the statement of a legal principle and not the creation of a fact. To the extent to which the legal principle might have been important to the appellant in this case, he was free to argue it to the jury. As a party to the litigation already briefed for the Court of Appeals, he was not in the dark as to that "well established law," the responsibility for the knowledge of which he has herein imposed upon the prosecutor. (See contention 15 above.) It is

not contended that Judge Barrick gave any erroneous instruction on the law in this regard.

To the extent to which *Clark-King* dealt with the . tisfaction of the Lumsden note and the release of the deed of trust securing it, the case is not *res judicata* for present purposes, even forgetting the retroactivity problem. *Clark-King* was a civil action not involving the same parties involved in the present litigation. The facts in the two trials were not the same, nor were the issues. In *Clark-King*, the Court of Appeals noted at 269 Md. 507-508, "Indeed, the new note executed on or about June 4, 1971, for $24,000.00 by Clark-King to Madison was never introduced into evidence so that the inference may properly be drawn that this note would be adverse to the case of the appellees." That note was introduced in the present case, as was testimony relating thereto from both Mel Clark and Norman Hecht. *Clark-King* simply did not create new facts or reveal undiscovered facts; it simply afforded new legal authority with which to view preexisting facts. That is not newly discovered evidence.

It is, moreover, important to point out that the Lumsden trust was not the only preexisting and unrevealed deed of trust on Lot 13T. There was also the deed of trust to the State National Bank, which alone constituted legally sufficient evidence to sustain the false pretenses charge. The rule in this regard is well stated by 58 Am.Jur.2d, *New Trial*, § 175, at p. 391:

> "[A] new trial will not be ordered where it appears that, eliminating the disputed testimony, there remains sufficient evidence to sustain the verdict. A new trial will not be granted on a showing that testimony was perjured, false, or mistaken unless such testimony relates to a material issue and probably influenced the verdict or judgment, *so that without it a verdict or judgment cannot be sustained*." (Emphasis supplied)

The F. O. Day Company trust, critical to the three misappropriation-by-a-fiduciary convictions with respect to the Pollitt, Warfield and Holtzclaw lots, was also unaffected

by the decision in *Clark-King*. In denying the motion, Judge Barrick did not abuse his discretion.

The appellant's additional charges that the decision in *Clark-King* demonstrates 1) that the testimony of Norman Hecht was perjured, 2) that the State knowingly abetted that perjury, and 3) that the State purposely constructed the bulk of its closing argument upon this false thesis have already been disposed of in dealing with contention 15 above. The further charges that the search warrants were based upon the same false premises and that adverse pre-trial publicity and incarceration resulted from the same false premises are bald assertions and are, in any event, irrelevant on the issue of the denial of a new trial.

27. The Vacating of the Sentence

There was a lengthy sentencing hearing, which ran to seventy pages of transcript, and in the course of which two witnesses were called by the appellant and "a dozen others" were referred to but not called. Extensive argument was made by counsel for both sides, including two attorneys for the appellant. The appellant himself addressed the court. A statement of the appellant's escrow account was submitted for the court's consideration. The judge read and took into consideration a memorandum in aid of sentencing prepared by the appellant.

The appellant's main thrust was to mount a vigorous attack upon the pre-sentence report prepared by the probation department and to move that it be stricken. The present appellate contention is based on the denial of that motion to strike. The attack was full of sound and fury — the report was "entirely slanted and full of lies"; it was "biased and one-sided and full of gossip and unethical comments by members of the grievance committee of the local bar association"; if the probation officer had been "under oath, he should go to jail for perjury"; the report "is powerful contempt." It was likened to the secret inquisition described by Franz Kafka.

The report was actually rather routine. Both the appellant and the prosecutor gave his version of the criminal

incidents. The appellant's family background was discussed, with every descriptive adjective causing paroxysms of overreaction by the defense team. Two members of the Grievance Committee of the Montgomery County Bar Association gave information, which prompted charges of unethical conduct and violations of the professional canons.

The law is well set out in *Nickens and Rhodes v. State*, 17 Md. App. 284, 289, 301 A. 2d 49:

> "It is well settled that the sentencing judge is not limited by the strict rules of evidence, and the procedural policies of the State encourage him to consider information concerning the convicted person's reputation, habits, mental and moral propensities, and other matters that a judge ought to have before him in determining the sentence that should be imposed. *Mahoney v. State*, 13 Md. App. 105; *Smith v. State*, 5 Md. App. 633. The sentencing judge may properly consider information obtained outside the courtroom and from persons whom the defendant has not been given the opportunity to confront or cross-examine, provided the information is called to the defendant's 'attention so as to afford him an opportunity to refute or discredit it.' *Baker v. State*, 3 Md. App. 251."

The appellant was patently fully apprised of the report and rebutted it extensively. His own attorney referred to the presence of the probation officer in the hallway; yet that officer was never called and cross-examined. Judge Barrick gave the appellant every opportunity to contest the report:

> "THE COURT: Well now, Mr. Hirschkop, let me suggest to you that if there is anything in the report which you feel is untrue or if there is anything you wish to comment upon, you may do so, but I suggest that you be specific. I've got your idea that you don't like the report, but if there is anything in there that is incorrect or anything you wish to tell the Court, I'd be glad to hear it."

False pretenses permits a maximum sentence of ten years; the appellant received two. Fraudulent misappropriation by a fiduciary carries a term of from one to five years. The appellant received two. All sentences were made concurrent. We see no impropriety in the sentencing hearing and no demonstration of ill will, passion, prejudice or any other unworthy motive.

28. Alleged Prosecutorial Misconduct

The appellant lastly claims that "the actions of the prosecutor were so prejudicial to appellant's rights and so unjusticable [sic] that the convictions must be reversed." He charges "prejudice and a vengeful purpose to convict." Curiously, the appellant relies on *Nutter v. State*, 8 Md. App. 635, 262 A. 2d 80, out of which we can divine nothing bearing on prosecutorial misconduct. That case deals exclusively with the question of disclosure of confidential informants.

The appellant supports his claim with twenty-six unsupported examples of specific misconduct, "many of which [he asserts] are shown by the record." That last characterization, of course, draws immediate attention to its obvious converse. Fourteen of the charges are absolutely outside the record; furthermore, would be irrelevant to the merits of this appeal in any event; and, indeed, for the most part represent a perfectly legitimate course of conduct:

> "1. An abusive, full time, expensive, 3000-hour investigation, funded by an LEAA grant in excess of $200,000, which stretched over an extended period of time commencing in October of 1971 and which was instigated by Clyde Winters, Esq., attorney for another title insurance company at the time and a competitor of appellant."
>
> "2. The malicious choice by the prosecutor of appellant to investigate, when the newspaper stories precipitating such an investigation did not mention appellant but accused several other title attorneys. This violated appellant's rights to equal protection under the law."

"5. Appellant and his secretary were arrested without notice although the prosecutor had promised defense counsel otherwise. The prosecutor also forced appellant's original counsel and associate, George Paxton, Esq., to resign by threatening him with investigation. Most other employees of appellant resigned upon being threatened with long prison terms and exposure of their private lives by the prosecutor."

"6. At the appellant's bond hearing the prosecutor falsely represented to the Court that appellant had said to someone that he would "flee the country." This resulted in an initially large cash bond and therefore incarceration of appellant. At the later bond reduction hearing, the prosecutor failed to appear to be confronted by the person who supposedly made the statement to him."

"7. No newspaper reporters were present at the bond hearing, yet a large picture-story appeared in the morning newspaper upon authority of a falsely accusatory press release authored by the prosecutor."

"10. The prosecutor made a trip to Minnesota, at taxpayers expense, to recommend Clyde Winters, Esq., his investigator to represent them. The title company retained Mr. Winters (not one of their approved attorneys) who meanwhile also was retained to represent Mr. Young and Madison Bank (other principals in appellant's trial) at the instigation of the prosecutor."

"12. Upon investigation by appellant, acting upon credible information, it was learned that someone (it was not known who) had 'bugged' appellant's telephone line. Although there is no proof that the prosecutor did this, who else would tap appellant's line?"

"13. At the instigation of the prosecutor, a local county filed suit against appellant on a road bond

when the road was substantially complete and permit current."

"14. At the instigation of the prosecutor, the Internal Revenue Service called for an audit of appellants returns for the past three years."

"15. The prosecutor personally visited the remaining title insurance companies appellant used and had them cease doing business with him."

"16. The prosecutor personally visited the several banks appellant had a credit line with and had them call in all open notes and cease further credit relations with him."

"18. The malicious intent of the prosecutor is obvious from the purposes of the illegal search of appellant and the numerous, unfounded indictments."

"22. The prosecutor instigated a suit by the Bar Association to audit the books of appellant to further hinder, prejudice and violate his rights under the Constitution. The chief investigator for the Bar Assn. was Willard Nalls, Esq., who later unethically divulged secret grievance proceedings to the pre-sentence investigator in a prejudicial and false manner."

"23. The prosecutor and Mr. Nalls brought simultaneous grievance charges against appellant together with their cohort, Clyde Winters, Esq."

We again point out the outrageous impropriety of attempting to infect and affect an appellate decision by introducing considerations foreign to the record. (See contentions 14 and 23 above.)

Four of the appellant's charges of misconduct, based on the Court of Appeals decision in *Clark-King Construction Co. and Andresen v. Salter, et. al., supra*, have already been dealt with by us in discussing contentions 15 and 26 above:

"3. The willful placing of false information in the application and affidavit for the search warrants

used to search appellant's premises by the prosecutor, and the methods used, as previously described, to evade the proper rules of evidence and the Constitution."

"8. The purposeful and knowing use of the perjured testimony of Norman Hecht by the prosecutor at appellant's trial."

"9. The suppression, non-use and demonstrated hostility by unmerciful attack, of the evidence valiantly given by Frank Marsalek (who has since also suffered serious economic and professional loss as a result of the actions of the prosecutor)."

"26. Even as late as the hearing on the motion for a new trial and at the sentencing, the prosecutor was still attempting to further and foster the false testimony of Norman Hecht about the Madison note."

One of the charges of misconduct, we dealt with in discussing contention 14 above:

"11. The execution and suppression of the clandestine 'immunity' agreement with Mr. Clark by the prosecutor. Mr. Clark, the brother-in-law of Henry Peterson (of the Dept. of Justice), was used as a spy against appellant by virtue of this agreement in violation of the attorney-client privilege and *Miranda* decision."

Three of the charges of alleged misconduct, we considered in dealing with the denial of the continuance (contention 16 above) and in dealing with the question of notice to the appellant as to the immunity agreement with Mel Clark (contention 14 above):

"19. The prosecutor purposely did not mail a copy of his bill of particulars as ordered to do by the Court and pleaded ignorance thereto."

"20. The prosecutor supplied the names of 54 to 57 witnesses, knowing he would use less than half,

and withheld their proper addresses until the last moment. All of this was prejudicial to appellant's defense."

"21. The prosecutor gave evasive and incomplete answers in his last minute response to the bill of particulars. Another prejudicial tactic."

One of these subcontentions was thoroughly discussed in disposing of contention 11 above:

"25. The prosecutor's closing argument, particularly the rebuttal portion, was insulting and prejudicial to appellant."

One of the charges is moot as affecting the merits of this appeal, because the counts referred to in the charge were abandoned. The question of the appellant's arrest or the defamation of his professional reputation are totally outside the compass of this case:

"4. The allegations of extremely large losses (over $100,000) in the bill of information used to arrest and defame appellant while the prosecutor had full knowledge that not *one penny* had ever been expended much less lost by the alleged victims. The subsequent abandonment of these counts, and several other serious but unfounded charges later indicted for, emphasizes these false allegations and wrongful purposes."

The next to last charge of prosecutorial misconduct is that:

"17. A former employee, June Stup, who admittedly had stolen from and forged while employed by appellant, but was not prosecuted by him, continuously wrote her own checks on a closed account. She purchased a new $3,600 car with one of them. The prosecutor excused this and numerous other, sizeable bad checks in exchange for her testimony. He even arranged for her to plead *nolo*

contendere so that she could not be impeached by her long record."

There does not appear to have been any agreement concerning immunity for Miss Stup in return for her testimony. Contrary to the claim that the prosecutor thwarted impeachment, Miss Stup testified that she was "let go" by the appellant because of some bad checks which she had written. Miss Stup was prosecuted and entered a plea of nolo contendere. She was awaiting sentence at the time of her testimony in this case and indicated that no agreement as to sentence had been reached with the prosecutor.

The final claim of prosecutorial misconduct was:

"24. Mr. Nalls' daughter-in-law, Deborah Nalls, was an investigator for the prosecutor."

We can perceive no misconduct of any sort in securing the services of a skilled and highly competent individual.

Twenty-six times nothing is nothing.

After lengthy consideration of all of these twenty-eight contentions and innumerable subcontentions, it is clear that the appellant's four convictions for false pretenses against the Title Insurance Company of Minnesota must be reversed (see contention 3 above); that his conviction for false pretenses against Standard-Young Associates must be affirmed; and that his three convictions for fraudulent misappropriation by a fiduciary with respect to the Pollitt, Warfield and Holtzclaw lots must be affirmed.

Judgments as to count one of Bill of Information No. 3100 and counts three, seven and eleven of Indictment No. 3103 affirmed; judgments as to count two of Bill of Information No. 3100 and counts four, eight and twelve of Indictment No. 3103 reversed; costs to be paid by appellant.

JULIUS A. ROMANO
CLERK

Court of Special Appeals
of Maryland
Annapolis, Md. 21401
TELEPHONE 267-5646

HOWARD E. FRIEDMAN
CHIEF DEPUTY
THAYER A. LARRIMORE
ANN C. SIMMONS
DEPUTIES

February 11, 1975

Peter C. Andresen, Esquire
3514 Plyers Mill Road
Kensington, Maryland 20795

Re: Peter C. Andresen v. State of Maryland
No. 152, September Term, 1974

Dear Mr. Andresen:

Please be advised that your motion for reargument and modification of opinion in the captioned case was denied by the Court on February 11, 1975.

A copy of the mandate is enclosed and the record is being returned to the Clerk of the lower court forthwith.

Very truly yours,

Julius A. Romano
Clerk

JAR:plb

Enclosure

cc: Mr. Charles C. Keller, Clerk (with enclosure)
Circuit Court for Frederick County
Frederick J. Bower, Esquire (with enclosure)
Philip J. Hirschkop, Esquire (with enclosure)
David B. Lamb, Esquire (with enclosure)
Frank W. Marsalek, Esquire (with enclosure)
State's Attorney for Frederick County (with enclosure)
Attorney General (with enclosure)

MANDATE

Court of Special Appeals of Maryland

No. 152 , September Term, 19 74

Peter C. Andresen

v.

State of Maryland

Appeal from the Circuit Court for Frederick County
Filed: April 15, 1974
April 22, 1974 - Order of Court upon its own motion advancing case for argument during court session of September 9-13, 1974 inclusive.
May 8, 1974 - Order to enter appearance filed : Peter C. Andresen in his own behalf.
May 30, 1974 - Motion for order to correct record filed by counsel for appellant.
June 26, 1974 - Motion granted.
July 10, 1974 - Received from Clerk of lower court transcript of testimony subject matter of order of this Court dated June 26, 1974: placed with record.
July 11, 1974 - Received and placed with record statement from Elizabeth Hale, Court Reporte for additional stenographic costs, (218.75 and 108.50 additional)

(over)

STATEMENT OF COSTS:

In Circuit Court:

Record 20. (Montg.) 75. (Frederick)
Stenographer's Costs 3,163.75

In Court of Special Appeals:

Filing Record on Appeal	20.00
Printing Brief for Appellant	964.18
Reply Brief	
Portion of Record Extract — Appellant	
Appearance Fee — Appellant	
Printing Brief for Appellee	1,114.85
Portion of Record Extract — Appellee	
Appearance Fee — Appellee	

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this Seventh day of February *A. D. 19 75*

Julia A. Simons

Clerk of the Court of Special Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

Docket entries continued-

July 31, 1974 - Certified copy of accountants statement received from appellant pursuant to order of June 26, 1974.
August 10, 1974 - Line entering appearance of Frank W. Marsalek, Esquire as co-counsel for appellant filed.
January 10, 1975 - Opinion by Moylan, J. Judgments as to count one of Bill of Information No. 3100 and counts three, seve and eleven of Indictment No. 3103 affirmed; judgments as to count two of Bill of information No. 3100 and counts four, eight and twelve of Indictment No. 3103 reversed; costs to be paid by appellant.
February 7, 1975 - Motion for Reargument and Modification of Opinion filed by Peter C. Andresen.
February 11, 1975: Motion denied.
February 11, 1975: Mandate issued.

PETER C. ANDRESEN

v.

STATE OF MARYLAND

IN THE

Court of Appeals of Maryland

Miscellaneous Docket No. 15

September Term, 1975

(No. 152, September Term, 1974

Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: March 31 , 1975.

JAMES H. NORRIS, JR.
CLERK

Court of Appeals of Maryland

Courts of Appeal Building
Annapolis, Md. 21401

301-267-5341

JOSEPH L. DiSAIA
CHIEF DEPUTY

OLIVE JANE RICHARDS
VIRGINIA STEHLE HUBBARD
MARY J. MORRIS
DEPUTIES

April 11, 1975

Peter C. Andresen, Esquire
Attorney at Law
3514 Plyers Mill Road
Kensington, Maryland 20795

Re: Peter C. Andresen v. State of Maryland
Misc. Docket No. 15 - September Term, 1975

Dear Mr. Andresen:

This is to advise that your "Motion for Reconsideration of Petition for Writ of Certiorari to the Court of Special Appeals" and "Motion for Statement of Reasons for Denial of Writ of Certiorari to the Court of Special Appeals" filed in the above entitled matter were denied by the Court on April 10, 1975.

Very truly yours,

James H. Norris, Jr.
Clerk

JHNjr/mjm
cc: Office of the Attorney General

Supreme Court, U. S.
FILED
NOV 20 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR CERTIORARI FILED JUNE 28, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

ABE DUPLICATORS, INC.—1732 'Eye Street, N.W.—Washington, D.C.—298-6937

INDEX

Page

Opinion of the Court of Special Appeals of Maryland . . . . . A. 1

Letter from the Clerk of the Court of Special Appeals of Maryland noting denial of Motion for Reargument and Modification of Opinion . . . A. 89

Mandate of the Court of Special Appeals of Maryland . . . . . A. 90

Order of Court of Appeals of Maryland denying Petition for Certiorari to the Court of Special Appeals of Maryland . . . . . A. 92

Letter from the Clerk of the Court of Appeals of Maryland noting denial of Motions for Statement of Reasons for Denial of Writ of Certiorari to Court of Special Appeals and for Reconsideration of Petition for Writ of Certiorari to Court of Special Appeals . . . A. 93

(The above pages are included in the Appendix to Petition for Writ of Certiorari previously submitted.)

Relevant Docket Entries . . . . . (ii)

Search Warrant – 3700 Decatur Ave. . . . . A. 94

Application and Affidavit for a Search Warrant – 3700 Decatur Ave. . . . . A. 97

Excerpts from Search Warrant – 3514 Plyers Mill Road . . . . . A. 114

Excerpts from Application and Affidavit for a Search Warrant – 3514 Plyers Mill Road . . . . . A. 116

Page

Report and Return of Search Warrant – 3700 Decatur Avenue . . . . . A. 119

Report and Return of Search Warrant – 3514 Plyers Mill Road . . . . . A. 122

Motion to Suppress Evidence . . . . . A. 129

Memorandum in Support of Motion to Suppress Evidence . . . . . A. 131

Memorandum and Order re: Motion to Suppress Evidence . . . . . A. 136

Excerpts from Transcript of Proceedings on Motions

Austin L. Moyer . . . . . A. 144
Joseph Lawrence . . . . . A. 155
Deborah Nalls . . . . . A. 156
Joseph Lawrence . . . . . A. 165
Argument by Mr. Lamb . . . . . A. 166

Excerpts from Transcript of Proceedings on Merits

Carl Zentz . . . . . A. 173
George Young . . . . . A. 176

List of Relevant Docket Entries

State of Maryland v. Peter C. Andresen – No. 3100, Record received from the Clerk of the Circuit Court for Montgomery County, March 6, 1973

Search Warrants, etc. received from Clerk of the Circuit Court for Montgomery County and filed, April 9, 1973

Mem. and Court order filed that motion to suppress evidence be granted to certain items and denied as to others, etc., dated April 19, 1973

Verdict "Guilty on the 1st and 2nd Counts" and by the Court Judgment "Guilty", May 30, 1973

Defendant sentenced to Division of Correction for the period of Two Years on the 1st Count and Two Years on the 2nd Count to run concurrent with sentence on the 1st count, both dating from the 5th day of October 1973 or on date mandate is returned from the Court of Special Appeals if Appeal is timely filed, October 5, 1973

State of Maryland v. Peter C. Andresen, Record received from Clerk of the Circuit Court for Montgomery County, March 6, 1973, No. 3103

Charge: Larceny After Trust of One Hundred Dollars or More (3 Counts); Embezzlement (3 Counts); Fraudulent Misappropriation by Fiduciary (3 Counts); False Pretenses (4 Counts); Forgery (1 Count); Uttering (1 Count); Failure to Pay Tax and Recordation Charge (1 Count); Misrepresentation of Taxable Consideration (1 Count)

Answer of State to Motion for Discovery and Inspection filed with service, April 11, 1973

Search Warrants, etc. received from Clerk of the Circuit Court for Montgomery County and filed, April 9, 1973.

Mem. and Court order filed that motion to suppress evidence granted to certain items and denied as to others, etc. (S.W. 3) April 19, 1973

Defendant sentenced to Division of Correction for the period of Two Years on the 3rd Count to run concurrent with sentence in No. 3100 Criminals; Two Years on the 4th Count to run concurrent with sentence on the 3rd Count and with sentence in No. 3100 Criminals; Two Years on the 7th Count to run concurrent with sentence on 3rd and 4th Counts and with sentence in No. 3100 Criminals; Two Years on the 8th Count to run concurrent with sentence

on the 3rd, 4th and 7th Counts and with sentence in No. 3100 Criminals; Two Years on the 11th Count to run concurrent with sentence on the 3rd, 4th, 7th and 8th Counts and with sentence in No. 3100 Criminals and Two Years on the 12th Count to run Concurrent with sentence on 3rd, 4th, 7th and 11th Counts, + all dating from the 5th day of October 1973 or on date mandate is returned from the Court of Special Appeals if Appeal is timely filed, October 5, 1973

[dated October 30, 1972]

SEARCH WARRANT

STATE OF MARYLAND

vs

THE PREMISES KNOWN AS LAW OFFICES OF PETER CHRISTIAN ANDRESEN, A PARTICULAR BUILDING WITHIN THE COMPLEX OF OFFICES AND STORES KNOWN AS 3700 DECATUR AVENUE WITH NUMERALS 3700 SHOWN TO THE LEFT OF THE ENTRANCE WAY, SAID PREMISES LOCATED ON THE SECOND FLOOR OF A TWO STORY RED BRICK BUILDING WITH ONLY THE SECOND FLOOR FRONTING ON DECATUR AVENUE, THE DESCRIPTION OF SAID PREMISES APPEARS ON WINDOWS TO THE LEFT OF ENTRANCE WAY, AS WELL AS WINDOWS ON THE SECOND FLOOR FACING CONNECTICUT AVENUE AS "LAW OFFICES PETER CHRISTIAN ANDRESEN," ALL OF WHICH IS LOCATED IN KENSINGTON, MONTGOMERY COUNTY, MARYLAND.

STATE OF MARYLAND
MONTGOMERY COUNTY:

TO: Kenneth W. Watkins, Superintendant of the Department of Police, Montgomery County, Maryland, or any other person authorized or whose assistant is requested or is needed. Greetings:

Whereas an affidavit having been made before me by Special Investigators Austin A. Moyer and Joseph L. Lawrence of the Bi-County Major Frauds Unit of the Montgomery County and Prince George's County State's Attorneys' Offices, that they have probable cause to believe that on the premises known as Law Offices of Peter Christian Andresen, a particular building within the complex

of offices and stores known as 3700 Decatur Avenue with numerals 3700 shown to the left of the entrance way, said premises located on the second floor of a two story red brick building with only the second floor fronting on Decatur Avenue, the description of said premises appears on windows to the left of entrance way as well as windows on the second floor facing Connecticut Avenue as "Law Offices Peter Christian Andresen," all of which is located in Kensington, Montgomery County, Maryland there are now concealed upon said premises the following items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland:

title notes, title abstracts, title rundowns; contracts of sale and/or assignments from Raffaele Antonelli and Rocco Caniglia to Mount Vernon Development Corporation and/or others; lien payoff correspondence and lien pay-off memoranda to and from lienholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lenders instructions for a construction loan or construction and permanent loan; disbursement sheets and disbursement memoranda; checks, check stubs and ledger sheets indicating disbursement upon settlement; correspondence and memoranda concerning disbursements upon settlement; settlement statements and settlement memoranda; fully or partially prepared deed of trust releases, whether or not executed and whether or not recorded; books, records, documents, papers, memoranda and correspondence, showing or tending to show a fradulent intent, and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland, 1957 Edition, as amended and revised, together with

other fruits, instrumentalities and evidence of crime at this unknown.

The grounds for search and basis for probable cause are set forth in the attached Application for the issuance of a search warrant, which grounds are as fully specified in the attached Application and Affidavit affixed hereto and made a part of this search warrant.

You are therefore commanded, with the necessary and proper assistance to:

(a) Enter and search the suspected premises, as completely described as aforesaid;

(b) Open and search any desks, cabinets, safes, and any other items and places within the captioned premises;

(c) Seize all evidence and paraphernalia permitted by law;

(d) And bring said evidence and paraphernalia before me, the subscriber, or some other judge of the 6th Judicial Circuit, to be retained according to law.

Hereof fail not at your peril and have you then and there this warrant.

Given under my hand this 30th day of October, in the year of our Lord, One Thousand nine hundred and seventy two.

/s/ signature illegible

Judge of the Sixth Judicial Circuit
Montgomery County, Maryland

[dated October 30, 1972]

* * *

APPLICATION AND AFFIDAVIT FOR A SEARCH WARRANT

TO: The Honorable Judges of the Sixth Judicial Circuit of Maryland

Application is herewith made for a Search and Seizure Warrant in that there is probable cause to believe that the laws relating to false pretenses, as defined in Article 27, Section 140 of the Annotated Code of Maryland, 1957 Edition as Amended and revised are being violated upon the following premises:

A particular building within the complex of office buildings and stores known as 3700 Decatur Avenue with the numerals 3700 shown to the left of the entrance way, said premises located on the second floor of a two story red brick building with only the second floor of same fronting on Decatur Avenue. The description of premise appears on windows to the left of entrance way, as well as windows on the second floor facing Connecticut Avenue as "Law Offices Peter Christian Andresen", all of which is located in Kensington, Montgomery County, Maryland.

The names of your affiants are Special Investigator (S/I) Austin A. Moyer and Special Investigator (S/I) Joseph L. Lawrence of the Bi-County for Montgomery County, Maryland and the State's Attorney for Prince George's County, Maryland.

The facts tending to establish the grounds for this application and the basis for probable cause are as follows:

On or about October 25, 1972, and on previous occassions, S/I Austin A. Moyer interviewed George Young

and Audrey E. Young, and they related to him the following:

That George Young and Audrey E. Young are and have been, respectively, Secretary and President of both Young Contracting Company, Inc. and Steven Development Corporation. On or about May 8, 1972 Young Contracting Company, Inc. and Standard Investment Corporation (a subsidiary of Standard Savings and Loan Association of Gaithersburg) formed a joint venture known as Standard-Young Associates, for the purpose of dividing all joint real estate development profits and losses on a 50%-50% net basis. Your affiants have in their possession and have read the Standard-Young Associates Joint Venture agreement and George and Audrey E. Young's representations are correct. They also represented to S/I Moyer that over the years they have had numerous business transactions for which Peter C. Andresen was the legal counsel and settlement attorney and these transactions were successfully consummated and to the best of the Young's knowledge competently performed, thus causing them to strongly rely upon what they considered to be Andresen's expert legal counseling.

George Young and Audrey E. Young also related to S/I Moyer that on or about July 18, 1972 they were present in the law offices of Peter C. Andresen, 3700 Decatur Avenue, Kensington, Maryland for the purpose of settlement of their purchase from the seller of lot 13, block T, Section 10, Potomac Woods subdivision, Montgomery County, Maryland (hereinafter referred to as 13T). As a consequence of this settlement, Young Contracting Company, Inc. was conveyed title to 13T from the legal titleholders, Raffaele Antonelli and Rocco Caniglia, by

deed dated June 4, 1972, and recorded in the land records of Montgomery County on July 19, 1972 at 10:10 A.M. in liber 3922, folio 344 (a copy of which is attached hereto and made a part hereof as Exhibit #1). Raffaele Antonillo and Rocco Caniglia had been conveyed title to 13T by Clark-King Construction Company, Inc. by deed dated October 31, 1969 and recorded in the land records of Montgomery County on November 28, 1969 at liber 3922, folio 344 (a copy of which is attached hereto and made a part hereof as Exhibit #2). In this transaction, Andresen was the settlement attorney for Raffaele Antonelli according to him.

During the course of this settlement, George Young inquired of Peter C. Andresen, who was acting as settlement attorney for both seller and buyer, whether or not it was necessary for them to obtain for Young Contracting Company, Inc., in whose name the property was to be titled, title insurance to the extent of the $12,000.00 purchase price of the property. Andresen responded, "No, you don't . . . The title is clear . . . It's a good deal." Considering Andresen's statements as being a competent expert's opinion, they relied upon them and did not purchase owner's title insurance at this time. Thereupon, George Young paid to Andresen the sum of $7,000.00 and George Young and Audrey E. Young, on behalf of Young Contracting Company, Inc., executed a $5,000.00 promissory note (a copy of which is attached hereto and made a part hereof as Exhibit #3) to the contract seller, secured by a deed of trust (a copy of which is attached hereto and made a part herof as Exhibit #4), thereby totaling a sales price of $12,000.00 which was called for by the sales contract for 13T dated June 19, 1972 (a copy of which is attached hereto and made a part hereof

as Exhibit #5). Your affiants here note that on October 25, 1972 S/I Lawrence interviewed Raffaele Antonelli who produced what he termed to be all the papers he and his partner, Rocco Caniglia, possessed concerning their purchase and sale of 13T and he produced only a partially executed copy of what allegedly was his and his partner's contract with Mount Vernon Development Corporation for the sale of 13T (attached hereto and made a part hereof as Exhibit #6).

Additionally, the aforesaid sales contract dated June 19, 1972 provided for the "Broker to accept [the] deed of trust and note for commission and pay $3,000.00 cash to seller for endorsement thereof" and that "The Seller recognizes Kensington Associates Realty, Inc., as the Agent(s) negotiating this contract", and agrees to pay a brokerage fee as the commission has been defined; that is, the $5,000.00 promissory note made by Young Contracting Company, Inc. was to be assigned to the broker upon payment of $3,000.00, so that there resulted a $2,000.00 commission. The contract was signed Peter Andresen, Broker or Sales Manager. The stock ledger sheets of Kensington Associates Realty, Inc. in your affiants' possession indicate that as of the end of September, 1972 a total of 100 shares of Kensington Associates Realty, Inc., were issued and they are owned by Peter Andresen. The stock ledger sheets of Mount Vernon Development Corporation — the contract seller of 13T and signitory to the sales contract of June 19, 1972 — in your affiants' possession, indicate that as of the end of September, 1972 a total of 100 shares of Mount Vernon Development Corporation were issued and they are held by "Peter C. Andresen, attorney Trustee for owners" with no explanation in the minute book (as of the end of September, 1972),

which is also in your affiants' possession, as to the identity of the alleged "owner" for whom Andresen is holding the shares in trust. In the cases of both Kensington Associates Realty, Inc. and Mount Vernon Development Corporation, the shares held by Peter C. Andresen are the total number of shares which have been issued. The latest Articles of Incorporation of Mount Vernon Development Corporation, which describe its business as that of real estate construction and financing, dated April 26, 1967, and which are presently on file with the Clerk of the Circuit Court for Montgomery County and which have been read by your affiants, indicate that Peter C. Andresen is an incorporator, resident agent and director of Mount Vernon Development Corporation, and that "the directors [who] shall act until the first annual meeting or until their successors are duly chosen and qualfied ***". The minute book (as of the end of September, 1972), which is in your affiants' possession, indicates no meetings or proceedings, as is required by Maryland law, of Mount Vernon Development Corporation have ever transpired. On March 13, 1972, Ira Burdette, who described himself as a general superintendant for Andresen's real estate construction businesses, told your affiants that "Andresen was the owner of all the corporations" and Ira Burdette mentioned that Mount Vernon Development Corporation was one of them. In early September, 1972 John Sivers, who described himself as the president of the mother corporation which Andresen in fact "owned" and operated for his own benefit, also stated that Andresen in fact "owned" and controlled Mount Vernon Development Corporation for Andresen's own personal gain.

In addition to the $2,000.00 broker's commission Andresen received, George Young and Audrey E. Young relate

that they paid Andresen $50.00 for the settlement of the sale of 13T of the monies of the Standard-Young Associates Joint Venture, and this is evidenced by the buyer's settlement sheet for 13T which is in your affiants' possession. Furthermore, your affiants have spoken to various representatives, including Robert Freedman, general counsel and a director, of Standard Savings and Loan Association of Gaithersburg, and your affiants have thereby been informed that Andresen has represented George Young and Audrey E. Young in their business matters for several years, that Andresen mostly, if now always, handled the property purchase settlements and the various Standard Savings and Loan construction loan settlements for Young Contracting Company, Inc. and Steven Development Corporation and that Andresen was aware of the Standard-Young Associates Joint Venture from its inception since, among other reasons, Andresen prepared the Articles of Incorporation for Young Contracting Company, Inc., and that Standard Savings and Loan Association of Gaithersburg would have the Standard-Young Associates Joint Venture construction loans settled with the attorney of George Young's choosing. George Young related to S/I Moyer this same information concerning Andresen being their legal counsel regarding business and settlement matters and that Andresen actually knew of the Standard-Young Associates Joint Venture and that 13T was such a joint venture because George Young had told him prior to the 13T transaction. Therefore, your affiants conclude that by selling 13T to Young Contracting Company, Inc. for purposes of a Standard-Young Associates Joint Venture, with Standard Savings and Loan Association of Gaithersburg giving the construction loan, that Andresen would obtain the fees for the settlement of that construction loan.

George Young and Audrey E. Young related to S/I Moyer that on or about July 18, 1972 Andresen did in fact settle the $52,000.00 construction loan from Standard Savings and Loan Association of Gaithersburg to Young Contracting Company, Inc. for construction of a residence on 13T, and that they paid Andresen a settlement fee for conveying the property for the assoc. Standard Savings and Loan Association of Gaithersburg was issued an executed mortgagee's title insurance policy by the Title Insurance Company of Minnesota (hereafter referred to as TIM), which is in the possession of your affiants, based upon the report and certification of title prepared and signed by Peter Andresen and dated as certified to July 19, 1972 at 10:10 A.M., which is in the possession of your affiants, in consideration of a $145.00 premium paid by the Association according to George Young and Audrey E. Young who conveyed the $145.00 to Andresen. Andresen, as sub-agent for TIM, the record of Andresen's being appointed sub-agent being in your affiants possession, received $32.25 or more in commissions for issuing this mortgagee's title insurance policy, according to the representations and records, which are in your affiants' possession, of Frank W. Marsalek, Executive Vice President of Shenandoah Land Title Corporation, who represents that he is the Maryland agency for TIM, and which TIM in turn confirms. Andresen's final report and certification of 13T which Frank W. Marsalek relates caused him to issue the mortgagee's title insurance policy represents that no mortgages or deeds of trust were at that time outstanding against 13T. In fact, a review of the pertinent land records of Montgomery County by Deborah Nalls (described hereinafter) indicates to your affiants that the following notes secured by recorded deeds of trust were existing encumbrances at that time: (a) a

deed of trust securing a note at liber 3773, folio 598 (a copy attached hereto and made a part hereof as Exhibit #7), recorded on August 2, 1968 against 13T and other lots, from Clark-King Construction Company, Inc. to Peter C. Andresen and William H. Matthews, trustees, securing State National Bank of Bethesda for $31,000 (hereinafter referred to as State National D/T) and which has never been paid as to 13T and which was not released as to 13T until October 3, 1972, in liber 4281, folio 589 (a copy of which is attached hereto and made a part hereof as Exhibit #8) according to Bruce E. Covert, Senior Vice President of State National Bank of Bethesda on October 26, 1972; and (b) a deed of trust securing a note at liber 3797, folio 799 (a copy of which is attached hereto and made a part hereof as Exhibit #9), recorded on October 9, 1968 against 13T and other lots, from Clark-King Construction Company, Inc. to James Salter III and Owen M. Taylor, trustees, securing Arthur Dale Lumsden (assigned to Madison National Bank, June 4, 1971) for $24,000 (hereinafter referred to as Madison D/T), and which has never been paid nor released according to Norman Hecht, Vice President of Madison National Bank on October 27, 1972, and both of which have been confirmed by a diligent examination of the land records of Montgomery County by Deborah Nalls, Investigator/ Research Assistant for the Bi-County Major Frauds Unit who for several years was employed by a law firm in Montgomery County for the purpose of searching land titles.

Robert Freedman of Standard Savings and Loan Association of Gaithersburg related to your affiants during October, 1972 that Standard Savings and Loan Association had given the $52,000 Maryland construction loans on 13T

in reliance upon the TIM mortgagee's title insurance policy which stated that Standard Savings and Loan's construction loan was in fact a first deed of trust as is required by Maryland law to be given by a Savings and Loan Association. George Young represented to S/I Moyer that as of October 25, 1972 Standard-Young Associates had ceased building the residence of 13T pending threatened foreclosures pursuant to the State National D/T and the Madison D/T and had incurred losses involving $23,064.50 invested in the project.

George Young and Audrey E. Young related to S/I Moyer that on or about September 13, 1972 George Young learned from Standard Savings and Loan Association who in turn had learned from Madison National Bank, that Madison National Bank held a senior unpaid, unreleased deed of trust on 13T, namely, the Madison D/T. George Young stated that on that date he went to Andresen's law offices and inquired of him as to the status of title on 13T, and Andresen acknowledged the existence and non-payment of the State National D/T and the Madison D/T. George Young further related that he demanded an owner's title insurance policy on 13T and Andresen assented. Young Contracting Company, Inc. paid Andresen the premium and Young Contracting Company, Inc. (the Joint Venture titled 13T in that name) was issued an executed owner's title insurance policy by TIM, which is in the possession of your affiants, based upon the report and certification of title prepared and signed by Peter Andresen and dated as certified to July 19, 1972 at 10:10 a.m., a copy of which is in your affiants' possession. Andresen, as sub-agent for TIM, received no less that $11.50 in commission for issuing this owner's title insurance policy, according to the representations and records of Frank W. Marsalek, which are in your

affiants' possession. Andresen's final report and certification of 13T, which Frank W. Marsalek relates caused him to issue the owner's title insurance policy, represents that no mortgages of deeds of trust were at that time outstanding against 13T, except the aforementioned construction loan and the aforementioned deed of trust from Young Contracting Company, Inc. to Mount Vernon Development Corporation securing the aforementioned note for $5,000.00. In fact, the State National D/T and the Madison D/T were senior encumbrances and security for the unpaid notes.

Your affiant, S/I Joseph L. Lawrence, based upon his seven years of training and experience as a law enforcement officer and investigator, and based upon special training and experience he has received during the past 22 months investigating consumer and commercial frauds under the guidance, supervision, and tutelage of Jeffrey Russell Werner, an Assistant State's Attorney for Montgomery County for the past 40 months, who has received specialized training and education in the field of white collar fraud crimes, and whose duties as Director of the Bi-County Major Frauds Unit for the past six months have been confined exclusively to the investigation and prosecution of white collar frauds and especially the crime of false pretenses, has particular expertise as to the elements of the crime of false pretenses and the type and kind of evidence necessary to prove the crime of false pretenses.

Your affiant, S/I Austin A. Moyer, based upon his 22 years of training and experience as a law enforcement officer and investigator and based upon special training and experience he has received during the seven years

prior to May 1, 1972 with the Metropolitan Police Department of the District of Columbia and the Major Frauds Unit of the United States Attorney's Office for the District of Columbia, and since May 1, 1972 with the Bi-County Major Frauds Unit investigating consumer and commercial frauds under the guidance, supervision, and tutelage of Jeffrey Russell Werner, has particular expertise as to the elements of the crime of false pretenses and the type and kind of evidence necessary to prove the crime of false pretenses.

Your affiants related that they know that the crime of false pretenses in the State of Maryland is committed when a person (1) by making a false representation of a past or existing fact; (2) with intent to defraud; (3) with knowledge of its falsity; (4) obtains any chattel, money or valuable security from another; (5) who relies upon the false representation; (6) to his detriment.

Based upon the aforementioned partial description of your affiants' experience and training, and based upon the information which they pooled as the result of their conduct of this investigation, your affiants aver that there is probable cause to believe that at least four crimes of false pretenses have been committed and which have been described, wherein the victims are Young Contracting Company, Inc. and Standard Investment Corporation as the Standard-Young Associates Joint Venture in the purchase of 13T; Standard Savings and Loan Association of Gaithersburg as the lender of the 13T construction funds; TIM as the insuror of the 13T mortgagee's title insurance policy; and TIM as the insuror of the 13T owner's title insurance policy.

WHEREFORE, your affiants pray that a search and seizure warrant be issued authorizing them, together with

the necessary assistance, to enter the captioned premises and to search all desks, cabinets, closets, safes and other items and places within the captioned premises, where the following items may be concealed that directly pertain to the sale and conveyance of 13T from Raffael Antonelli and Rocco Caniglia to Mount Vernon Development Corporation to Young Contracting Company, Inc.:

1. Any and all title notes, title abstracts, and title rundowns.

2. Any and all fully executed contracts of sale and/or assignments from Raffaele Antonelli and Rocco Caniglia to Mount Vernon Development Corporation and/or others.

3. Any and all lien pay-off correspondence and lien pay-off memoranda to and from lienholders and noteholders.

4. Any and all correspondence and memoranda to and from trustees of deeds of trust.

5. Any and all lender's instructions for a construction loan or construction permanent loan.

6. Any and all disbursement sheets and disbursement memoranda.

7. Any and all checks, check stubs and ledger sheets indicating disbursements upon settlement.

8. Any and all correspondence and memoranda concerning disbursements upon settlement.

9. Any and all settlement statements and settlement memoranda.

10. Any and all fully or partially prepared deed of trust releases, whether or not executed and whether or not recorded.

11. Any and all other books, records, documents, papers, memoranda, and correspondence, showing or tending to show a fraudulent intent and/or knowledge as elements of the aforementioned four false pretenses crimes.

Furthermore, the aforementioned recorded State National D/T and recorded Madison D/T (copies of which are attached hereto and made a part hereof as Exhibits #7 and #9), reveal that in addition to 13T, numerous other lots located in Section 10 and other sections of the aforementioned Potomac Woods are or were held as security for those two deeds of trust, and the aforesaid diligent search of the land records by Deborah Nalls indicates that as of October, 1972 there existed among the land records no documents indicating a substitution or change of those lots held as security for those deeds of trust. Exhibits #7 and #9 also indicate that the equitable titleholder of those lots formerly or presently held as security for the State National D/T and Madison D/T (including 13T) was Clark-King Construction Company, Inc., and the aforesaid diligent search of the land records by Deborah Nalls indicates that as of October, 1972 said equitable title remains in Clark-King Construction Company, Inc. unless sold and conveyed to a home buyer or the home buyer's permanent financer, the latter being the case as to most, but not all, of the said lots. According to Bruce E. Covert and Norman Hecht, the notes secured by the State National D/T and the Madison D/T, respectively, have been paid in part and partial releases of the respective deeds of trust have been signed as authorized

to be released by them or by their agent; copies of their records which are in your affiants' possession confirm each of their statements and indicate that they have each been the person in charge of the making and payment of the respective notes for their banks. On October, 19, 1972 S/I Moyer interviewed William Hancock and E. Harold Patterson who related that they owned County-Wide Realty Company, Inc. and that their corporation had an exclusive brokerage on the Potomac Woods lots on which Clark-King Construction Company, Inc. held the equitable title and was the builder of residential houses thereon. They related that Andresen has settled most, if not all, of these homes and that he is to settle the home on lot 16, block S, Potomac Woods "within the next few weeks or so." On October 19, 1972 S/I Lawrence interviewed Peter Hitchen, who represented himself to be the Comptroller of the F. O. Day Company, Inc., and who produced various records which are in your affiants' possession and which indicate to your affiants that he in fact is the Comptroller of the F.O. Day Company, Inc., who related that Clark-King Construction Company, Inc. is indebted to F. O. Day Company, Inc. in the form of an unpaid note secured by a deed of trust from Clark-King Construction Company, Inc. to Peter C. Andresen and William C. Wheeler, trustees, securing F. O. Day Company, Inc. for $37,000.00 and which is recorded at liber 3934, folio 772 (a copy of which is attached hereto and made a part hereof as Exhibit #10). Peter Hitchen further related that Andresen prepared and signed his signature to a handwritten statement, a copy of which your affiants have in their possession, dated September 26, 1972 and which refers to and pertains to lot 16, block S, Potomac Woods, stating among other things that, "Said lot to be sold in approximately 40 days from date."

On October 19, 1972 S/I Lawrence interviewed Melvin L. Clark, Jr., who identified himself as President of Clark-King Construction Company, Inc., and whose corporate books and records, which are in your affiants' possession, confirm this, related that Peter Andresen had been the settlement attorney for himself as seller, and for the buyer, for most, if not all, of the numerous homes he has built on the lots Clark-King Construction Company, Inc. owns or owned before conveyance to the home buyer, in Potomac Woods.

Therefore, based upon the aforementioned partial description of your affiants' experience and training, and based upon the information which they pooled as the result of their conduct of this investigation, your affiants further aver that there is probable cause to believe that there exists within the confines of the captioned premises books, records, documents, papers, memoranda, and correspondence, which are, include and pertain to, title notes, title abstracts, and title rundowns; lein pay-off figures and amounts to and from lienholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lender's instructions for construction loans and/or construction and permanent loans; disbursements from settlement; deed of trust releases; title insurance binders and policies; and other items connected therewith; which were prepared for, in preparation of, in furtherance of, and in discharge of Andresen's settlements and conveyances of those lots which were and are the subject of the security of the State National D/T and the Madison D/T (copies of which are attached hereto and made a part hereof as Exhibits #7 and #9). Your affiants reasonably conclude that these books, records, documents, papers, memoranda and correspondence last mentioned, do indicate

that Peter Andresen, as settlement attorney for the last mentioned lots, did and does have actual knowledge of the status and amounts oweing on the notes secured by the State National D/T and Madison D/T, before, during and after the aforementioned settlements of 13T, and which evidence, when taken together with other evidence previously outlined does indicate and will show the elements of fraudulent intent and knowledge in the previously mentioned four false pretenses crimes concerning 13T.

WHEREFORE, your affiants further pray that the search and seizure warrant be issued authorizing them, together with the necessary assistance, to enter the captioned premises and to search all desks, cabinets, closets, safes and other items and places within the captioned premises, where the following items may be concealed that pertain to the sale and conveyance of the last mentioned lots that are the subject of the State National D/T and Madison D/T.

12. Any and all books, records, documents, papers, memoranda, and correspondence, which are, include and pertain to, title notes, title abstracts, and title rundowns; lien pay-off figures and amounts to and from leinholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lender's instructions for construction loans and/or construction and permanent loans; disbursements from settlement; deed of trust releases; title insurance binders and policies; and other items connected therewith; which were prepared for, in preparation of, in furtherance of, and in discharge of Peter Andresen's settlements and conveyances of those lots which were and are the subject of the State National D/T and the Madison D/T (copies of which are attached hereto and made a part hereof as Exhibits #6 and #9).

And respectfully request that the attached Search Warrant issue forthwith.

/s/ Joseph L. Lawrence,	/s/ Austin A. Moyer,
Joseph L. Lawrence, Affiant Special Investigator; Bi-County Major Frauds Unit of the Montgomery County and Prince George's County State's Attorneys' Offices	Austin A. Moyer, Affiant Special Investigator; Bi-County Major Frauds Unit of the Montgomery County and Prince George's County State's Attorneys' Offices

Sworn to before me, and subscribed in my presence this 30th day of October, 1972.

/s/ signature illegible
Judge of the Sixth Judicial Circuit
Montgomery County, Maryland

[dated October 30, 1972]

EXCERPTS FROM SEARCH WARRANT

STATE OF MARYLAND

vs

THE PREMISES KNOWN AS MOUNT VERNON DEVELOPMENT CORPORATION, A PARTICULAR BUILDING CONTAINING A NUMBER OF VARIOUS OFFICES KNOWN AS 3514 PLYERS MILL ROAD, WITH NUMERALS 3514 SHOWN TO THE LEFT OF THE MAIN ENTRANCE WAY OF A TWO STORY, WHITE MASONARY BUILDING AND A PARTICULAR ONE ROOM OFFICE WITHIN SAID OFFICE BUILDING LOCATED ON THE BASEMENT FLOOR WITH FIVE STEPS LEADING DOWN TO AN UNMARKED BLACK DOOR, SAME BEING THE ONLY ENTRANCE FACING THE REAR OF SAID OFFICE BUILDING ENCLOSED BY A WROUGHT IRON RAILING, ALL OF WHICH IS LOCATED IN KENSINGTON, MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND
MONTGOMERY COUNTY:

TO: Kenneth W. Watkins, Superintendant of the Department of Police, Montgomery County, Maryland, or any other person authorized or whose assistant is requested or is needed. Greetings:

Whereas an affidavit having been made before me by Special Investigators Austin A. Moyer and Joseph L. Lawrence of the Bi-County Major Frauds Unit of the Montgomery County and Prince George's County State's Attorneys' Offices, that they have probable cause to believe that on the premises known as Mount Vernon Development Corporation, a particular building containing a number of various offices known as 3514 Plyers Mill Road, with

numerals 3514 shown to the left of the main entrance way of a two story, white masonary building and a particular one room office within said office building located on the basement floor with five steps leading down to an unmarked black door, same being the only entrance facing the rear of said office building enclosed by a wrought iron railing, all of which is located in Kensington, Montgomery County, Maryland there are now concealed said premises the following items pertaining to sale, purchase, settlement, and conveyance of lot 13, Block T, Potomac Woods subdivision, Montgomery County, Maryland:

* * *

(The balance of this warrant is identical to the Search Warrant pertaining to 3700 Decatur Avenue)

[dated October 30, 1972]
STATE OF MARYLAND

vs

THE PREMISES KNOWN AS MOUNT VERNON DEVELOPMENT CORPORATION, A PARTICULAR BUILDING CONTAINING A NUMBER OF VARIOUS OFFICES KNOWN AS 3514 PLYERS MILL ROAD, WITH NUMERALS 3514 SHOWN TO THE LEFT OF THE MAIN ENTRANCE WAY OF A TWO STORY, WHITE MASONARY BUILDING AND A PARTICULAR ONE ROOM OFFICE WITHIN SAID OFFICE BUILDING LOCATED ON THE BASEMENT FLOOR WITH FIVE STEPS LEADING DOWN TO AN UNMARKED BLACK DOOR, SAME BEING THE ONLY ENTRANCE FACING THE REAR OF SAID OFFICE BUILDING ENCLOSED BY A WROUGHT IRON RAILING, ALL OF WHICH IS LOCATED IN KENSINGTON, MONTGOMERY COUNTY, MARYLAND

EXCERPTS FROM APPLICATION AND AFFIDAVIT FOR A SEARCH WARRANT

TO: The Honorable Judges of the Sixth Judicial Circuit Court of Maryland

Application is herewith made for a Search and Seizure Warrant in that there is probable cause to believe that the laws relating to False Pretense, as defined in Article 27, Section 140 of the Annotated Code of Maryland, 1957 Edition as amended and revised are being violated upon the following premises known as Mount Vernon Development Corporation, a particular building containing a number of various offices known as 3514 Plyers Mill Road, with numerials 3514 shown to the left of the main entrance way of a two story, white masonary building and a particular one room office within said office building located on the basement floor with five steps leading down to an unmarked black door, same being the only entrance facing the rear of said office building enclosed by a wrought iron railing, all of which is located in Kensington, Montgomery County, Maryland.

* * *

(This portion of the application is identical to that pertaining to 3700 Decatur Avenue)

* * *

Furthermore, your affiants relate that on or about September 26, 1972 S/I Moyer had occassioned to be present in the captioned premises at 3514 Plyer's Mill Road, Kensington, Maryland and there observed Charles G. Bieber seated at the second desk from the entrance and from the conversation overhead, he apparently was conducting business over the telephone. S/I Moyer thereupon conversed with Charles G. Bieber on and about the premises

and he related that the premises were being used as his business location. Charles G. Bieber appears as Mount Vernon Development Corporations' signatory for the sales contract for 13T between Mount Vernon Development Corporation and, purportedly, with Raffaele Antonelli and Rocco Caniglia (a copy attached hereto and made a part hereof as Exhibit #6), signing as purchaser. That sales contract states the address of the purchaser to be "3514 Plyers Mill Road., Kensington, Maryland." Charles G. Bieber also signed the sales contract between Steven Development Corporation (ultimately the property was titled in the name of Young Contracting Company, Inc.) and Mount Vernon Development Corporation, as the representative of Mount Vernon Development Corporation, (a copy attached hereto and made a part hereof as Exhibit #5).

On October 29, 1972 and on a previous occassion S/I Moyer spoke with June Stup who related that until September, 1972 she was employed as a typist in the aforesaid law offices of Peter Andresen. She stated that she was aware that Charles G. Bieber was associated with Mount Vernon Development Corporation, possibly as its treasurer, and that she learned this as a result of, first, inter-office discussions conducted in her presence with reference to Mr. Bieber's position with Mount Vernon Development Corporation; second, as the result of calling Mr. Bieber at phone number 949-1090 on matters relating to Mount Vernon Development Corporation; third, knowledge that phone number 949-1090 is located at 3514 Plyers Mill Road, Kensington, Maryland.

On October 13, 1972 S/I Moyer spoke to Carl Zentz who represented that since September, 1969 until present he has been employed by Peter Andresen as title searcher,

and more recently, as supervisor of all title searchers employed by Peter Andresen, and that he is intimately familiar with the title notes, title abstracts, and title rundowns prepared for Peter Andresen, and that they are normally and typically kept in Peter Andresen's aforesaid law offices and also in the aforesaid 3514 Plyer's Mill Road, Kensington, Maryland.

* * *

(The balance of this affidavit is identical to that pertaining to 3700 Decatur Avenue).

REPORT AND RETURN

I received the attached search warrant on the 30th day of October, 1972 and have executed it as follows:

On the 31st day of October, 1972, at 11:00 o'clock A.M. I searched the premises described in the warrant.

The following is an inventory of property taken pursuant to the warrant:

1. File labeled "Antonelli to Mount Vernon to Young Contracting Company 72-242" containing settlement sheets, deeds of trust, correspondence, and other paraphernalia concerning settlement of lot 13, block T, Potomac Woods.

2. Stock certificate for Charles Holding Corporation.

3. Stock certificate for Revis Engineering Corporation.

4. File labeled "Clark-King to Holtzclaw 70-307 7(t) P.W." containing settlement sheets, deeds of trust, correspondence and other paraphernalia concerning settlement of lot 7, block T, Potomac Woods.

5. File labeled "Standard to Stonestreet J.V. 70-305" containing settlement sheets, title insurance binders and other paraphernalia concerning settlement of lots 1 and 2, block 1, Rockville, Park.

6. File labeled "Title Co. Correspondence" containing correspondence of title companies.

7. File labeled "Clark-King to Antonelli 69-351 13(t)" containing settlement sheets, correspondence, and other paraphernalia concerning settlement of 13T.

8. Deed of trust filed at Liber 4210, folio 847 from

Clark-King Construction Company, Inc. to F.O. Day, Inc.

9. File labeled "James A. Federline Inc. to Clark-King Construction Co. 72-135" containing deed of trust, correspondence, settlement sheets and other settlement paraphernalia.

10. Handwritten note from Peter Andresen to F.O. Day Co., Inc. dated September 26, 1972.

11. Letter from Mary A. Garner to Revis Engineering Corporation dated September 27, 1972.

12. Letter from E. Harold Patterson to Peter Andresen, Esquire dated October 13, 1972.

13. File labeled "Equitable to Clark-King (Ground Trust) 67-354" containing deed of trust settlement sheets, and other settlement paraphernalia.

14. File labeled "Clark-King to Chepuras (2 (11) MCA PK) 71-409" containing settlement sheets correspondence, and other settlement paraphernalia.

15. File labeled "Clark-King to Lyons 70-166" containing settlement sheets, insurance binders, and other settlement paraphernalia.

16. File labeled "Enterprise to Clark-King 69-328 6-8 (T) P.W." containing settlement sheets, insurance binders, and other settlement paraphernalia.

17. File labeled "Federline to Clark-King 70-180" containing "Deed of Trust," deed of trust note, and other settlement paraphernalia.

18. File labeled "Pinehurst to Clark-King 71-454" con-

taining deed of trust, settlement sheet and other settlement paraphernalia.

19. File labeled "Pinehurst to Clark-King 70-129" containing settlement sheet, deed of trust release and other settlement paraphernalia.

20. Ledger sheet showing $2,000.00 balance.

21. File labeled "Clark-King to Clark 67-311" containing settlement sheets, contract, correspondence, and other settlement paraphernalia.

22. Check stubs from and including 7616 to 7859.

23. Three (3) Columnar Pads showing various figures.

24. Grantor list of Clark Construction Company, Inc.

25. Title Abstracts of Potomac Woods subdivision.

26. Letter from Dores Chepuras dated October 6, 1972.

27. File labeled "State N B to Clark 68-281" containing Deed of trust correspondence, and other settlement paraphernalia.

28. File marked "Elic to Clark-King 69-128, 11, 12, 13(s)" containing subordination agreement correspondence and other settlement paraphernalia.

29. File labeled "Pinehurst to Clark-King, 71-454" containing settlement sheets, title binder and other settlement paraphernalia.

This inventory was made in the presence of Peter C. Andresen and Lori Hall. I swear that this inventory is a true and detailed account of all the property taken by me

on the warrant.

/s/ John * * * /s/ Joseph L. Lawrence

Subscribed and sworn to and returned before me this 3rd day of November, 1972.

/s/ DAVID L. CAHOON
CIRCUIT COURT JUDGE
FOR MONTGOMERY
COUNTY, MARYLAND

REPORT AND RETURN

I received the attached search warrant on the 30th day of October, 1972 and have executed it as follows:

On the 31st day of October, 1972, at 11:00 o'clock A.M. I searched the premises described in the warrant.

The following is an inventory of property taken pursuant to the warrant:

1. Blue "Phone-O-Grams Book" with a 7-13 phone call directed to "Charlie" from Mrs. Antonelli.

2. Blue Long Distance Telephone Log with "Frank Marsalek 293-4190" as one of the numbers listed.

3. "Promissory Note", attached to paper by clip Pete-from-Charlie.

4. Three (3) imprints of Corporate Seals "Second Chance", "Guarantee Maintenance" and "Associated Mortgage".

5. Desk Calendars from October back through April

1972, October 6th notation "Nat. Bank of Washington".

6. Folder captioned "Jones View – Lots 6 & 10 – Block B" containing note from trustees that Guaranteed Maintenance purchased same.

7. Folder captioned "Person VS Sivers and Panda" containing a letter dated July 17, 1972.

8. Folder captioned "31 Acres (Manassas)" containing a letter dated June 22, 1972, to Bieber-Canadian.

9. Brown spiral note book "Chas. Bieber" containing contracts "Revis".

10. Folder captioned "7804 Garland Ave" containing letter dated August 23, 1972 to Bieber "Chas Holding Corp".

11. Folder captioned "Glen Ecco Heights" containing a message directed to Mr. Sampson and Charlie.

12. Folder captioned "Catalogs" containing contract for Mount Vernon Development Corporation.

13. Folder captioned "Misc. Bills - Beach" containing bill for Revis dated 9/28/72.

14. Three (3) Checks Gude Industrial Development Corporation XXX All aforementioned items are contained in Green folder marked "A".

15. Folder captioned "Don Wolf" containing a counter check drawn on Revis prior to September 26, 1972.

16. Folder captioned "Unpd bills A-Z Mass. Ave." containing bills for Revis and Canadian, prior to September

26, 1972.

17. Folder captioned "unpd bills A-Z Mass Ave." containing bills for Revis and Canadian, prior to September 26, 1972.

18. Folder captioned "unpd bills A-Z Alabama Ave S.E." containing bills for Canadian prior to September 26, 1972.

19. Folder captioned "Unpd bills Sea Isl." containing bills for Canadian prior to September 26, 1972.

20. Folder captioned "Unpd bills A-Z Williams" containing bills prior to September 26, 1972.

21. Folder captioned "Unpd bills - delivery Tickets Kemp Mill" containing bills for Canadian prior to September 26, 1972.

22. Folder captioned "Unpd bills Wheaton Lane A-Z" containing unpd bills for Canadian prior to September 26, 1972.

23. Folder captioned "Unpd bills 1104 Congress St. SE containing bills for Canadian prior to September 26, 1972.

24. Folder captioned "Unpd bills McComas Properties" containing bills for Revis prior to September 26, 1972.

25. Folder captioned "Unpd bills A-Z Gude Ind. Dev." containing bill for Gude prior to September 26, 1972.

26. Folder captioned "Unpd bills Gosport Ct" containing bills for Canadian Prior to September 26, 1972.

27. Folder captioned "Unpd bills Franklin Dr." con-

taining bills for Canadian prior to September 26, 1972.

28. Folder captioned "15Th St" containing bills for Canadian prior to September 26, 1972.

29. Envelope containing tax bills for Revis dated prior to September 26, 1972.

30. A quantity of Devlin Lumber bills for Canadian prior to September 26, 1972.

31. Resolution Corp. Account Madison Apple Grove with Sivers, Sampson and Breen.

32. Two letters to Apple Grove from Canadian Re: Loan prior to September 26, 1972.

33. Revis Engineering counter check prior to September 26, 1972.

34. Letter from Security National Bank to Revis note payment due prior to September 26, 1972.

35. Quantity of bills from Charles County to Jones View prior to September 26, 1972.

36. Quantity of Tax bills Charles County to Jones View prior to September 26, 1972.

37. Quantity of checks Canadian prior to September 27, 1972 State National Bank (all the above items lined in folder marked 30 thru 37).

All the above items taken from the third desk in office and are contained in green file folder "B".

38. Folder file captioned "Unpd bills Westchester Estates" containing bills for Revis prior to September 26, 1972.

39. File folder captioned "Unpd bills General Acct." containing bills for Canadian prior to September 26, 1972.

40. One brown book captioned "Westchester Estate acct. Payable" prior to September 26, 1972.

All the above items taken from the third desk and maintained in their own state

41. Folder captioned "Apple Grove Development Corp." containing papers dated prior to September 26, 1972.

42. Folder captioned "South Georgetown Corp." containing Instructions on how to form a corporation.

43. Folder captioned "Mount Vernon Development Corporation" with items prior to September 26, 1972.

All the above taken from 1st desk, packaged by rubber band and Marked "C".

44. Folder captioned "Potomac Woods A" containing: original Deeds of Trust, subordination agreement, releases, title rundowns, work sheets, title Insurance policies and waivers of liens, settlement sheets and associated papers all involving Clark-King Construction Co.

45. Folder captioned "Potomac Woods B" containing initially the same material as above.

46. Folder captioned "Mel Clark" containing accounting sheet listing Equitable-Lumsden etc. Deed of trust notes, account sheets due, and owing, correspondence of Clark King and Andresen, and associated papers.

47. Folder captioned "Westchester Estates General" "Stonco" containing title work rundown sheets, deeds of

easement, agreements, deeds and associated papers.

48. Folder captioned "Westchester Estates General" "Revis Engineering Corporation" containing title reports, deeds, subordination agreements, easement reports, etc.

49. Folder captioned "Apple Grove General" containing title rundown sheets, deeds of easements, deeds of trusts, releases, mechanics Liens, title orders and associated papers.

50. Folder captioned "McAuley Park General" containing title reports, plat, and associated papers.

All the above removed from four drawer file, top drawer located in the rear of premises with large desk against same. All above enclosed in green case marked "D".

51. Folder captioned "Potomac Woods General" containing title rundowns, work sheets, deeds of easement, declaration of covenments, abstract reports, deeds of trust, title binders.

52. a) folder captioned "Gruver Grantor, D.C." containing Title report.

b) folder captioned "Grantor Lists A-M Prince George's Co." containing title rundown reports in names A thru M.

c) folder captioned "Grantor Lists N-Z Prince George's Co." containing title rundown reports in names N thru Z.

XXX These following all contain abstract work and papers of Carl Zentz.

d) folder captioned "Kendale General"

e) folder captioned "Covenants"
f) " " "Willowbrook General"
g) " " "Willowbrook General New"
h) " " "General File supplies"
i) " " "Title Searching Procedure"
j) " " "Bedfordshire General"
k) " " "Chandon Woods General"
l) " " "College Gardens - General file"
m) " " "Congressional Country Club Gen"
n) " " "Damazo corp. Judgements, home etc"
o) " " "Foxlee Manor general"
p) " " "Gredinger Subdivision"
q) " " "Hollywood Park General"
r) " " "Jones View General"
s) " " "Kemp Mill Estates General"
t) " " "Montevideo Count General"
u) " " "Orchard Estates General"
v) " " "Potomac Common-Gen. file"
w) " " "Potomac Village General"
x) " " "Rosedale Estates General"
y) " " "Snowden Oaks General"

All from a four drawer cabinet in the rear of the premises.

This inventory was made in the presence of H. Douglas Rodier and Pvt. G.M. Costello MCPD I swear that this

inventory is a true and detailed account of all the property taken by me on the warrant.

_____

Subscribed and sworn to and returned before me this _____ day of _____, 1972.

_____

CIRCUIT COURT JUDGE
FOR MONTGOMERY
COUNTY, MARYLAND

_____

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	)	
	)	
v.	)	No.
	)	
PETER C. ANDRESEN	)	

MOTION TO SUPPRESS EVIDENCE

Comes now the defendant, Peter C. Andresen, by his attorney, David B. Lamb, and respectfully moves this Honorable Court to suppress any and all evidence seized by members of the Bi-County Fraud Unit and/or Montgomery County Police Department from the premises known as 3700 Decatur Street and 3514 Plyers Mill Road, Montgomery County, Maryland on October 31, 1972.

As grounds for this motion defendant states as follows:

1. The search warrants for the aforementioned premises directed seizure of papers and files which were

communicative and/or testimonial in nature. Such seizure was in violation of the defendant's 4th and 5th Amendment Constitutional rights.

2. The officers and/or agents of the Bi-County Fraud Unit exceeded the scope of the search warrant in that substantial items were confiscated which did not relate to lot 13-T which was the subject of the warrant.

WHEREFORE, defendant respectfully requests that this Court suppress all evidence seized.

Respectfully submitted,

LAMB, EASTMAN & KEATS

by _____

DAVID B. LAMB
1742 N Street, N.W.
Washington, D.C. 20036
785-4822

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND)
)
v.) No.
)
PETER C. ANDRESEN)

MEMORANDUM IN SUPPORT OF
MOTION TO SUPPRESS EVIDENCE

I. ALL EVIDENCE SEIZED SHOULD BE SUPPRESSED BECAUSE THE SEIZURE VIOLATES DEFENDANT'S 5th AMENDMENT RIGHTS, THUS RENDERING THE SEIZURE UNREASONABLE WITHIN THE 4th AMENDMENT.

The close interrelationship between the 4th and 5th Amendments with regard to searches and seizures has long been recognized by the Supreme Court. In *Boyd v. U.S.*, 116 U.S. 616, 6 S.Ct. 524 (1886), the court fully discussed this relationship and declared itself

> "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself" p. 633

In *Boyd* the government obtained a court order to require defendant to produce in court his private books for purposes of review for the Internal Revenue Service. The court held that this was an unconstitutional authorization of authority, because defendant's books were the subject of mere evidence. Although the "mere evidence" rule of

Boyd was later reversed in *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1647 (1967), the thread of the interrelationship issue of the 4th and 5th Amendments remained good law and continued to be woven in later decisions.

The issue again was raised in *Gouled v. U.S.*, 255 U.S. 298, 41 S.Ct. 261 (1921). Again, *Gouled* was decided before *Hayden*. In *Gouled* a search warrant was issued, but the court held that even with a search warrant the books and papers of defendant were mere evidence of a crime and could not be constitutionally searched and seized in owner's home or office. But, when the court addressed itself to the issue of the possibility of admitting the private papers obtained into evidence, it had this to say:

> "It is the right and duty of the government to secure evidence of a crime, even from the accused himself, *if this can be done without violating his Constitutional rights*" p. 301 (emphasis added)

> "The admission of a paper so obtained in evidence against and over the objection of the owner when indicted for crime, compels him to be a witness against himself, in violation of the 5th Amendment." p. 306.

In *Marion v. U.S.*, 275 U.S. 192, 48 S.Ct. 74 (1927) the police had obtained a warrant for liquor but, during the course of their search, they discovered books and records concerning the operation of an illegal liquor enterprise. In holding the seizure illegal, the Supreme Court said:

> "The requirement that warrants shall particularly describe the things to be seized makes general

> searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." p. 196

Although *Hayden* establishes the "mere evidence" rule as being constitutionally permissive, it still left the intertwining issue open. The court stated that under *Boyd* and *Gould*, the evidence was inadmissible as violative of 4th Amendment rights. Therefore, the 5th Amendment problem was never met head on. The issue again was raised in this case, but the court found that the items of clothing introduced into evidence were not "testimonial" or "communicative" in nature under *Schmerber v. California*, 384 U.S. 757. But, if the items did pass the *Schmerber* test (which the court on prior occasions has so labeled as to books and papers as noted above) then the question as to their introduction whereby forcing defendant to become a witness against himself must be answered.

Justice Douglas in his dissent, addresses the issue head on. p. 319

> "Our question is whether the government, though armed with a proper search warrant or though making a search incident to an arrest, may seize, and use at the trial, testimonial evidence, whether it would otherwise be barred by the 5th Amendment or would be free from such strictures. The teaching of *Boyd* is that such evidence, though seized pursuant to a lawful search, is inadmissible."

Hayden did not involve a search warrant and therefor at no point was *Marion* discussed by the court. Moreover, *Marion* was cited with approval in *Berger v. New York*, 388 U.S. 4158, 87 S.Ct. 1973, decided *after Hayden*, thus making it quite clear, that the mere evidence rule applies to the authorizational basis of the search warrant, and is not a ticket for a general search which has been abhorred since colonial days and barred by both the Federal and State Constitutions.

As to date there are only two lower court decisions addressing themselves to this issue. In both cases, *cert* was denied by the Supreme Court.

The first case is a decision by the United States Court of Appeals, Second Circuit. In *U.S. v. Bennett*, 409 F.2d 888 (1969) as the result of a search incident to an arrest, the police seized a letter written to defendant as mere evidence of a crime. The Court of Appeals kept the traditional label of a letter as being "testimonial" and affirmed its admittance as being mere evidence. However, the letter was not written by the defendant, but to him, thus in itself not being truely testimonial.

Hill v. Philpott, 445 F.2d 144 (7th Cir., 1971) held that where production of taxpayer's personal books and records would have *properly been refused* on the basis of a 5th Amendment privilege against self-incrimination if they had been sought by a subpoena in a summons, the fact that they were seized pursuant to a valid search warrant did *not* preclude the taxpayer-defendant from claiming a violation of his 5th Amendment rights. The court states:

> "In overruling *Gouled* as to its 4th Amendment teachings, we do not believe that the court intended

to in any way diminish the 5th Amendment characteristics which might attach to certain items of property such as personal books and records. Indeed, the 5th Amendment holding of *Gouled* which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the *Warden* opinion."

II. THE SEIZURE EXCEEDED THE SCOPE OF THE WARRANT.

While effecting the search the agents of the Bi-County Fraud Unit seized numerous items of evidence which were not mentioned in the warrant and accordingly they should be suppressed by this Court. The most recent case dealing with the scope of a seizure pursuant to a warrant is *Hughes v. State,* 287 A.2d 299 (1972) wherein the court held that the items which the police may reasonably seize under a constitutionally valid warrant and search are not confined to those specifically designated on the warrant if a nexus exists between the item seized and criminal behavior. Such nexus is automatically provided in the case of fruits and instrumentalities of a crime and contraband, but may exist also as to mere evidence. Citing *Warden v. Hayden supra, Anglin v. State,* 227 A.2d 364 (1967), *Crawford v. State,* 267 A.2d 317 (1970). In the instant case the items seized were not instrumentalities or proceeds of a crime nor were the agents in a position to know whether the items constituted evidence of other criminal behavior.

Respectfully submitted,

LAMB, EASTMAN & KEATS
by DAVID B. LAMB
1742 N Street, N.W. Washington,
D.C. 20036 – 785-4822

[filed April 19, 1973]

STATE OF MARYLAND,	)	No. 3100, 3103 Crims.
Plaintiff,	)	In the Circuit Court
vs	)	for Frederick County
PETER CHRISTIAN ANDRESEN,	)	
Defendant.	)	

MEMORANDUM AND ORDER

In the above-entitled cases, Peter C. Andresen, Esq. (Andresen) has been indicted for the crimes of false pretense, larceny after trust, fraudulent misappropriation by a fiduciary, embezzlement, forgery, uttering, failure to pay tax and recordation charge, and misrepresentation of taxable consideration.

These charges stem from the activities of the defendant while conducting his practice of law in connection with certain acts involving real estate transactions, particularly the settlement of Lot 13, Block T, Potomac Woods Subdivision, Montgomery County, Maryland.

Prior to defendant's indictment, two search warrants were issued, one to search the complex of offices and stores known as 3700 Decatur Avenue, the law offices of Peter Christian Andresen, and the other to search various offices at 3514 Plyers Mill Road, both places located in Kensington, Montgomery County, Maryland. The Plyers Mill Road address was the office of Mt. Vernon Development Corporation, a corporation which is allegedly owned and operated by the defendant.

It is alleged in the application and affidavit that the probable cause for searching the above premises was that

certain letters, books, documents, papers, et cetera, were concealed there pertaining to the sale, purchase, settlement and conveyance of Lot 13, Block T, Potomac Woods Subdivision, Montgomery County, Maryland, which would show or tend to show a fraudulent intent and/or knowledge as elements in the crime of false pretense, and further provide for the seizure of other items that may be the fruits, instrumentalities and evidence of other crimes, at the time of the search unknown. As a result of the two searches, numerous records, papers and documents, et cetera, were obtained pertaining to Lot 13-T and numerous documents, papers, et cetera, which do not pertain to Lot 13-T but are evidence, according to the State, which would tend to prove plan, design or scheme. Some of that evidence obtained as a result of the present search warrant which did not pertain to Lot 13-T was used for the indictment in Cases Nos. 3101 and 3102 are not now before the Court.

The defendant filed a motion to suppress the evidence seized from the above-mentioned premises, alleging:

(1) "The search of the aforementioned premises directed seizure of papers and files which are communicative and/or testimonial in nature. Such seizure was in violation of defendant's Fourth and Fifth Amendments Constitutional rights.

(2) "The officers and/or agents of the Bi-County Fraud Unit exceeded the scope of the search warrant in that substantial items were confiscated which did not relate to Lot 13-T, which was the subject of the warrant."

Lengthy hearings were held by the Court on the motion to suppress the evidence, at which time arguments of

counsel were heard and considered. The arguments of the defendant will be considered in the order in which they were made.

United States Constitution,
Fourth Amendment

The Fourth Amendment to the United States Constitution provides, "The right of the people to be secured in their persons, houses, papers and effects against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The defendant's contention is that the evidence obtained as a result of the searches was in violation of the Fourth Amendment to the United States Constitution, for that there was not probable cause to confiscate those items which did not relate to Lot 13-T, which was the main subject of the application and affidavit for both search warrants. The United States Supreme Court, prior to the case of *Warden v. Hayden*, 387 U.S. 294, had made a distinction between instrumentalities of the alleged crime as distinguished from mere evidence which might aid in a particular apprehension or conviction. The Hayden case, however, overruled this distinction and held that the Fourth Amendment of the United States Constitution was not violated by the seizure of "mere evidence" if there was proven to be a nexus between the items seized and the criminal behavior. This case held that "mere evidence" may be seized if probable cause can be established that the evidence will aid in the particular apprehension or conviction. *Hughes v. State*, 14 Md. App. 497, supports this proposi-

tion, provided the warrant does not authorize a "general rummage through all the materials," in the place to be searched.

As a result of the hearing to suppress the evidence, the Court finds that there was not a nexus shown as to those items on the report and return of both search warrants, with the exception of items marked for the purpose of the suppression hearing as Defendant's Exhibits 10, 11, 12, 13 and 14 seized from the Plyers Mill Road premises; and items marked Defendant's Exhibits 15, 18, 35, 23, 16, 20, 24, 28, 29, 31, 32, 17, 21, 30, 19, 33 and 34 seized from the Decatur Avenue premises. These items are hereafter referred to as excepted items. All the other items have been returned to the defendant. Therefore only the excepted items will be further considered for the purpose of memorandum and order.

As to the excepted items, it appears to the Court that the State has conclusively shown a nexus between them and the alleged criminal behavior. The warrant did not authorize a "general rummage through all the materials" in the defendant's offices, and the warrant was not a general one. *Hughes, supra.*

Evidence Out of Date

Defendant contends that much of the evidence seized by the search warrant was out of date, in that it covered in some instances several years prior to the alleged offenses. The State contends that these items of evidence tend to show a plan, design or scheme by the defendant to perpetrate the alleged offenses and therefore should not be suppressed. The Court finds that the excepted items

are not too remote in time and that they may tend to aid in conviction by showing a plan, design or scheme and the intent of the defendant. *Gilchrist v. State*, 2 Md. App. 635.

Restitution

These cases involve the settlement of real estate transactions by the defendant, in which he allegedly gave certifications of clear titles when in fact he knew that there were outstanding encumbrances in the form of deeds of trust. Defendant's argument is that although there may have been outstanding encumbrances in the form of deeds of trust on certain parcels of real estate when they were settled, there had been releases filed on those particular parcels of land on the deeds of trust prior to the indictment. Assuming that the defendant did subsequently arrange to release the encumbrances on the real estate transaction subsequent to the closings, it would be no defense to the crimes charged against the defendant. *Delcher v. State*, 161 Md. 475 at 487. Furthermore, the evidence shows that one deed of trust involving Lot 13-T has never been paid.

Lack of Probable Cause

The determination of the existence of probable cause must be confined solely to the affidavit itself and evidence outside the affidavit, no matter by whom produced or how, is not relevant to the inquiry of probable cause. *Grimm v. State*, 7 Md. App. 491 at page 493. The defendant contends that there was no probable cause to search the premises at 3700 Decatur Avenue. The affidavit conclusively shows that George Young and Audrey E. Young were present in the law offices of the defendant

or on about July 18, 1972 where settlement was held for the purchase of Lot 13, Block T, Section 10 of the Potomac Woods Subdivision in Montgomery County, Maryland. As a consequence to that settlement, Lot 13-T was conveyed to Young Contracting Company and the purchasers were told by the defendant that the title was clear, when in fact it was not. As a result of this transaction, it seems to the Court that it is quite clear that evidence involving this settlement and others alleged in the affidavit would be found on these premises. The affidavits are lengthy ones, obviously done with much care, and supported by numerous exhibits, all of which establishes beyond any doubt, sufficient probable cause for the issuance of the warrants.

Fifth Amendment to the United States Constitution

The thrust of defendant's argument here is that he has the right of privacy in and over his person, house, papers and effects, on the ground that to permit those items to be introduced into evidence would be a prohibition against compulsory self-incrimination.

On this point there seems to be no Maryland law, and in two cases before the Federal system, the Courts took opposite views and in both cases certiorari was denied by the United States Supreme Court.

In *United States v. Blank*, 459 F2d. 2d 383 [Sixth Circuit, 1972], the United States Court made a distinction between those records sought by subpoena and records sought by search warrant. They held that there was a valid and important distinction. The subpoena compels

the person receiving it by his own response to identify the document and deliver as the one described in the subpoena; the search warrant involves no such element of compulsion upon an actual or potential defendant. In the *Hill v. Philpott* case, 445 Fed. 2d 145, Second Circuit, the Court held that the subpoena-search warrant distinction was "more shadow than substance," and held that the seizure of personal papers of the defendant was in violation of the Fifth Amendment. The Blank case in effect rejected the holdings in the Philpott case, and seems to this Court to be the better law. 8J, Wigmore, *Evidence*, Sec. 2264 [McNaughton, Rev., 1961]. It is conceded in this case that evidence produced by the defendant in response to a subpoena *duces tecum* would be in violation of the Fifth Amendment, but it is argued that evidence received as a result of the search warrant compels the defendant to do nothing. Relying on the Blank case and Wigmore on *Evidence*, this Court holds that the seizure of the excepted items by search warrant does not violate the Fifth Amendment to the United States Constitution.

Plain View Doctrine

One of the excepted items above, Number 19, obtained from the law offices of the defendant, is admitted by the State not to be an instrumentality of the alleged crimes provided in the affidavit and is not "mere evidence" to aid in the apprehension or conviction of defendant as to those alleged charges provided in either affidavit. The State's argument is that this evidence should not be suppressed because it was obtained under "the Plain View Doctrine." This item was found in a file in the law offices of the defendant while the search was being conducted. The testimony of one of the officers conducting

the search was to the effect that he discovered it and had a suspicion that it was evidence of another crime. There is an excellent analysis of the "Plain View Doctrine" in *Brown v. State*, 15 Md. App. 584.

Judge Moylan in the Brown case points out that in the doctrine as to conditions precedent to its application, first, there must be a justifiable prior intrusion; and, second, that the discovery be inadvertent. One of the four situations illustrated as a prior valid intrusion is "the warranted search of a given area for specific objects . . . in the course of [which] . . . the searchers [come across] some other articles of incriminating character." Both the searches in these cases were the result of a warranted search of a given area for specific objects, and therefore satisfy the first requirement. This was not a planned warrantless seizure which the Court prevents by the inadvertent requirement. There was ample reason to suspect in this case that the defendant had records of the alleged illegal transactions in his law offices, and seizure of this particular item did not require a further intrusion; and the discovery of the individual items not pertaining to the main subject matter of the affidavit was inadvertent. The requirements of the "Plain View Doctrine" are therefore met, and this item will not be suppressed.

For these reasons it is, this *19th* day of April, 1973, ORDERED that the motion to suppress the evidence be granted to all those items on the return and report with the exceptions of items marked for the purpose of the suppression hearing as Defendant's Exhibits 10, 11, 12, 13 and 14 seized from the Plyers Mill Road premises; and items marked for the purpose of the suppression hearing

as Defendant's Exhibits 15, 18, 35, 23, 16, 20, 24, 28, 29, 31, 32, 17, 21, 30, 19, 33 and 34 seized from the Decatur Avenue premises; and as to the items listed the motion is hereby denied.

Samuel W. Barrick
Judge

(Filed April 19, 1973)

TRUE COPY TEST:
Ellis C. Wachter
Clerk

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
ON MOTIONS

AUSTIN L. MOYER

* * * * *

DIRECT EXAMINATION

BY MR. LAMB:

* * * * *

[34] Q. When was your last interview with Mr. Hecht?
A. As I stated before, Mr. Lamb, it was prior to the affidavit and after Mr. Young's interview.

Q. Can your notes refresh your – A. I don't have my interview with Mr. Hecht with me at this time.

Q. Well, is it possible that it happened in September, or August? A. I don't believe so. I think it was after Mr. Young's.

Q. But you don't have any idea what month it was in? A. Not at this time.

Q. With respect to the interview with Mr. Hecht, you received information that there was a lien applying to Lot 13T, is that correct – that is the information you gave in your affidavit? A. Yes, sir.

Q. And Mr. Hecht informed you that he had been receiving payments from Mr. Andresen for the benefit of
[35] Mr. Melvin C. Clark? A. Yes.

Q. And did he also tell you when you talked to him that he had a check that was noted as to Lot 13T, indicating money to pay off the release of the lot?

MR. WERNER: I object, because this is not listed in this affidavit – he's going behind the affidavit.

MR. LAMB: Your Honor, I think this is definitely pertinent as to whether there was in fact probable cause to believe a fraud had been committed. The question is

whether any false pretense or fraud had been perpetrated when there is probable cause to believe that it was perpetrated. I submit that the basic allegations in the affidavit center themselves around the liens of record as to Lot 13, liens being held by Madison National Bank and by State National, and if in fact they were not liens of record at that time and the agent knew about it or knew that payment had been made, I submit that that is a misrepresentation in the affidavit which goes to the validity of the affidavit.

MR. WERNER: May I respond to that, Your Honor?

THE COURT: Yes.

MR. WERNER: Your Honor, contained within the exhibits attached to and made part of the affidavit and the search warrant is the deed for Lot 13T. I believe it is Exhibit Number 4. It is dated July 17, 1972 and the recorder's stamp for the Clerk's Office of Montgomery County
[36] is on it, July 19, 1972 – that is the critical date. Now, what happened between October 25th and October 30th when Mr. Moyer went to get the search warrant is not material. The crime was or was not committed when that land went to record with those releases – those trusts paid or not paid – that's the critical time, not October.

MR. LAMB: Your Honor, I submit that Mr. Werner's understanding of the real estate law is incorrect from the standpoint of when the fraud was committed. The mere fact that the deed was going to record –

THE COURT: I think we're getting far afield of the issues before us today. That may or may not be the law, but I don't think that's a question for the magistrate to determine in issuing the search warrant for the Circuit Court judge.

MR. LAMB: Your Honor, I submit that the facts that the Circuit Court judge had to review for a search warrant

–he has to determine whether there is probable cause to believe that some crime has been committed; probable cause to believe that evidence of the crime is located in the property where the search warrant is going to be executed. In determining that, the point in time when a warrant is to be issued, he has to consider the freshness of the facts and the truth of the facts. I submit that if false facts are contained in the affidavit, that that negates a probable cause. If there is no probable cause–

THE COURT: That would have to be known to the person who was issuing the search warrant, would it not?

[37] In other words, the law, as I understand it, is that we do not look beyond the four corners of the affidavit to determine whether or not there was probable cause, and I would like for you to present me a case where you can attack the search warrant on the basis that you're trying to.

MR. LAMB: Your Honor, I'm not trying to offer evidence external to the search warrant, the sheer proof of the truth or falsity of the facts contained therein by extraneous witnesses – I'm not talking about bringing in witnesses that the agent talked to; I'm talking about what was within the personal knowledge of the agent when he swore to the warrant and if he knowingly swore to facts which were incorrect – then I should say that that destroys the warrant, and a judge cannot determine that. If it comes out today that the agent knew in fact as of the date he swore to the warrant, number one, that releases were filed two months preceding that –

THE COURT: I think you're correct on that. You may proceed.

MR. LAMB: This is a search warrant and not an arrest warrant or anything like that, a search warrant incident

to an arrest – we're dealing with a different type of warrant. Now, Agent, when you talked to Mr. Hecht did he relate to you that he had received a check from Mr. Andresen which was applicable to Lot 13T about the 14th of September or thereafter? A. I recall a check; he mentioned a check, yes, sir.

[38] Q. And it related to Lot 13T, is that correct?

A. It related to Lot 13T; the date I can't remember.

Q. It was September, wasn't it? A. I don't know.

Q. Well, it was roughly about the same time that you interviewed the man? A. About that time, yes, sir – about that time.

Q. Did he show you the check? A. I can't remember whether he showed it to me or not at that time.

Q. And he related to you at that time that they were having some kind of a civil problem between Mr. Melvin L. Clark, Mr. Andresen and the bank as to what loans were being paid off by this money, is that correct? A. He related something, but it wasn't quite that.

Q. What did he relate? A. He related–

MR. WERNER: Your Honor, we object – he's going beyond the search warrant and the affidavit. What difference does it make – it isn't in the affidavit.

THE COURT: I'll overrule the objection.

A. He related that it would not go for payment on the note, but that it would be applied to other – other debts owed.

Q. Even though the check specified Lot 13T on it, and

[39] there was a release provided, is that correct? A. Yes, because as you said, there was some litigation which I didn't get involved in.

* * * * *

[42] MR. LAMB: I will ask the witness this question, Your Honor. The false pretense which you say you provide probable cause for in the affidavit, you say occurred in July of 1972? A. I believe.

Q. And not subsequent thereto? A. No.

Q. So there was three months between the date of the false pretense and the date you swore to the facts in the affidavit? A. Yes.

Q. So all the evidence contained here is three months old—all the evidence, within your personal knowledge, is three months old? A. Yes.

* * * * *

[104] THE COURT: Let's take them individually. Do you have any questions about this particular piece of evidence, Mr. Lamb?

MR. LAMB: Yes, Your Honor, I have.

CROSS-EXAMINATION

BY MR. LAMB:

Q. Agent Moyer, this particular piece of evidence at the time you found it, you didn't see that it had any direct relevance to the commission of a crime of false pretense, did you – it was only subsequent to that that you found that out? A. No, I believed it had relevance to the false pretense.

Q. What relevance? A. The fact that 13T was represented to Mr. Young as not having any trusts on it, and it turned out that eventually a State National Bank trust was on it.

Q. Does that document tend to prove one way or the other whether there was or was not false pretense?

[105] A. Not at the time of seizure, no.

Q. So at that time you had no knowledge of its evidentiary value in the proof of false pretense, did you?

A. This particular–

Q. You didn't even know what it was when you first saw it, the day you took it, did you? A. If I saw it, and I don't remember whether I did –

Q. You don't remember whether you saw it the day you seized it? A. I went through the file. There were certain things I seen which was represented to me– this here file tended to be involved with the Potomac Woods project, and that's why I seized it.

Q. So you took the whole file? A. That's right.

Q. And it wasn't until some later time that you saw some possible value, evidentiary value to that particular piece of paper as possible evidence introduceable in a proof of a crime of false pretense? A. Yes.

Q. And on its face it does not indicate a crime of false pretense, does it? A. On its face it indicates to

[106] me now that it is – it could be part of the crime of false pretenses.

Q. That's today, you're making that decision?

A. Yes, that's today.

Q. But not at the time it was seized? A. No.

REDIRECT EXAMINATION

BY MR. WERNER:

Q. One other question, if I may, Mr. Moyer. Knowing what you knew at the time you swore to the affidavit and then executed it, and going in and seeing this document with certain familiar names on it, namely, State National Bank, Lumsden and Antonelli, alongside of 13T and the fact that it was found in files which you thought or which were represented to you might belong to Mr. Andresen, did that in and of itself have some special significance to you in relation to the criminal prosecution?

A. Yes.

Q. What was that? A. That it, it could be used as evidence to explain the false pretense; possibly it might

be an instrumentality indicating a prior trust had not been released, which would be State National Bank, and that would be – indicate the transaction to the Antonellis prior to Mr. Young getting – prior to Mr. Young's transaction.

Q. Was there any special significance to you that it was found in a file that purportedly was Mr. Andresen's?

[107] A. Yes, it would link him up with it.

MR. WERNER: Thank you.

RECROSS-EXAMINATION

BY MR. LAMB:

Q. One further, Agent. All of this that you are relating at this time is opinion that you have now formulated, long after you seized the document, is that correct?

A. I believed at the time I had probable cause. Now–

Q. Officer, answer my question. First of all, you said you didn't even know the document was in the file when you seized it? A. I said I didn't remember, I'm sorry.

Q. You didn't remember, and you don't remember today? A. If it was in the file at that time, I don't remember. I know I looked in the file and there were certain items relating to the transaction that I was looking for, and as a result of that I seized the whole file.

Q. And on the basis of your investigation after – both before and after the seizure, today you are able to give the opinon that you think on the basis of your experience as an investigator that it does have a nexus – that is, today you are giving that opinion? A. Yes, naturally.

Q. But that's not necessarily the opinion you would have had on the day that you seized that piece of paper?

[108] A. Had I specifically picked this paper out and remembered it, it would be my opinion on that day as well as today.

Q. But you didn't even know you had it until some time after you took it? A. I don't remember whether

this was a document I looked at or another piece of paper reflected to me some connection between Lot 13T–I can't remember.

* * * * *

[110] RECROSS-EXAMINATION

BY MR. LAMB:

Q. Again, the testimony you are giving today is on the basis of information which has come to your attention after the seizure of this document, in trying to relate this document to other documents which you seized from Mr. Andresen's office? A. Yes.

Q. So you have reviewed this document together with the documents and files taken from Mr. Andresen's office pursuant to another search warrant, and then have decided that there is a relationship between this and what was found in Mr. Andresen's office? A. I don't quite understand your question, Mr. Lamb.

Q. It is a fact that after you took these files back to

[111] your office, that you reviewed the documents contained in the files and related them to the documents that were taken from Mr. Andresen?

THE COURT: I believe his answer to that question previously had been that he did pick up this file titled, "Potomac Woods," and that in that file he noticed that there were certain papers that would pertain to Lot 13A which of those papers, he took the file on the basis of those. He does not recall – he's answered that three or four times. I believe his testimony is that he doesn't know whether this was the paper or another paper or several papers that you called his attention to were in this file, and on the basis of that he seized it. Is that correct, Mr. Moyer?

THE WITNESS: Yes, sir.

MR. WERNER: The only thing I'm trying to get at is, his opinion today is on the basis of subsequent reviewing of this document in connection with other documents after the seizure, and not before.

THE COURT: I quite frankly don't understand your question. Maybe if you phrase it another way I'll understand it.

MR. WERNER: Yes, Your Honor. Agent, when you seized the file this document came from, you compared this document to other documents that were obtained in execution of the search warrant on Mr. Andresen's office, is that correct? A. And on others. And on–

Q. Plyers Mill Road? A. Yes, sir.

[112] Q. And is it at this time that you decided this did have a distinct bearing on the proof of the false pretense case? A. That particular document I cannot say yes or no, but one of the documents in the file where this document is part of, reflected to me that 13T, Potomac Woods, and attached to the affidavit was an inclosure of the deed of trust involved in Lot 13T.

Q. Where on this document is 13T referred to?

A. "Lot or Parcel 13, Block T, Section 10, Potomac Woods."

Q. And what is – strike that. And you came to find out subsequently to that the recording information of that deed – A. Yes, sir.

Q. –By which Mr. Clark transferred the property out to somebody else; and do you know when that happened?

A. If I can see the affidavit I could tell you.

MR. LAMB: I will withdraw the question. No further questions.

THE COURT: All right. Do you have any other questions, Mr. Werner?

REDIRECT EXAMINATION

BY MR. WERNER:

Q. Mr. Moyer, with respect to what is now Defendant's Exhibit 13, being a yellow legal pad, the first two pages of which are clipped because they apparently came loose, but the last page or the last line of the entry, will you

[113] please read that to the Court. A. "Lot 13"– under "Lot" is Number 13; under "Block" is the letter T; under "Section" is 10 and then there's a number, 69-351, Rafaelle Antonelli, liber and folio number – the liber is 3922, the folio number is 344.

Q. What does that indicate to you? A. That would indicate that there was a transaction in the land records of Montgomery County under the liber and folio listed, to the name Rafaelle Antonelli.

Q. And–? A. It would appear to be a transfer of title or transfer of deed.

Q. You have already explained as to the last exhibit, what the liber and folio meant, the lot and block number. With regard to 69-351, have you encountered that particular number before in your investigation? A. I have encountered a series or the number system which is used by Mr. Andresen, or which was reported to be used by Mr. Andresen, which would list the year and then the case number following the year.

Q. Did you encounter any of these such numbers in the various legal instruments purportedly prepared by Mr. Andresen or signed by Mr. Andresen? I'm referring to deeds of trust, notes, whatever – settlement sheets; numbers such as this. A. I have knowledge of the use of

[114] numbers such as this in Mr. Andresen's preparing documents of that sort.

Q. What, then, does that number represent to you?

A. It would represent to me that a file number 69-351

should reflect the total transaction under the name of Mr. Antonelli.

Q. And that was Mr. Andresen's case number?
A. Yes, it appeared to be.

Q. Did you have or can you recollect on this particular occasion whether or not this document was specifically seen by you at the time of seizure? A. No, I can't.

Q. The same answer as you have given on the other one? A. Yes.

* * * * *

RECROSS-EXAMINATION

BY MR. LAMB:

* * * * *

[118] Q. Again, you have no specific recollection of this document at the time of seizure? A. No.

* * * * *

[121] Q. Have you ever seen that document before today?
A. I believe this is the document within the file that I looked at. It looks more familiar than any other.

Q. Do you have any particular memory of seeing that document at any time personally at the scene? A. Yes.

Q. When? A. At the time I seized them, I think this is the one I'm more familiar with than any of the rest.

Q. Are you familiar with each and every page? There must be – must have been originally fifty pages.

Q. No, not each and every page.

Q. So you didn't review each page? A. No.

Q. Again, this was seized, as the others, because it was part of the Potomac Woods file? A. Right.

Q. And then you took it back to your office and then you looked at it and determined what benefit it would have as evidence in the case? A. Yes.

* * * * *

JOSEPH LAWRENCE
DIRECT EXAMINATION

BY MR. LAMB:

* * * * *

[155] Q. Some seven months preceding this – the charges which give rise to the warrant itself? A. I think that would be some ten months.

Q. Ten months, excuse me. And is that the last and most recent date in that file? A. I cannot answer to that, sir.

Q. Well, all of those documents in that file – not all of them have any direct bearing on scheme or plan or motive, do they? A. No, they do not, sir.

Q. How many documents in that file have bearing on proof of scheme or motive? A. I would have to search the file to tell you exactly how many.

Q. So is it fair to say that there is a substantial part of the file which really tends to prove–nothing that would be evidence, in your opinion, to prove scheme, motive or plan in the carrying out of the operation? A. That's correct.

Q. That is also applicable to a number of other files you related or testified to, that had some indirect bearing on Lot 13T, is that correct? A. Would you say that again, please.

MR. LAMB: I'll withdraw the question. The next file being Number 15, Clark-King to Lyons.

(Defendant's Exhibit 25 marked.)

MR. LAMB: Does that have any direct bearing on Lot 13T? A. No direct bearing, no.

[156] Q. Does it have the same bearing as related in the previous file, namely, tending to show motives, scheme or

carrying out of a plan? A. That particular file also shows knowledge of existing trust as to Lot 13T.

Q. What is the date of the knowledge you can impute to Mr. Andresen? How old is that file? A. Well, there is a document here bearing the dates of – I guess it's April, 1970.

Q. So that means it was thirteen or fourteen months before? A. No, it does not mean that it was thirteen or fourteen months before. That particular document was thirteen or fourteen months before. There's another one here, May of 1970; there's another one of March, 1970. Basically, the documents are dated in the March, April, May period of 1970.

Q. So it is fair to say that it was at least one year prior to the sale of Lot 13T? A. Approximately a year.

Q. And eighteen months preceding execution of the warrant? A. That is correct.

* * * * *

[186] DEBORAH NALLS
CROSS-EXAMINATION

BY MR. LAMB:

* * * * *

Q. Well, your investigation covered Mr. Andresen's activities for at least one year preceding July? A. At times the investigation involved transactions that had begun years before – for example, deeds of trust where the settlement had been years before and they weren't released until the time of our investigation, or after.

Q. At the time you executed the search warrant you were aware of the fact that formal charges were going to be brought very shortly against Mr. Andresen, were you not? A. At the time of the search warrant?

Q. At the time you executed that warrant. A. I knew that – I didn't know for a certainty; I knew that there was a sizeable amount of evidence regarding Lot 13T.

Q. The bill of complaint charging him with four counts of false pretense had already been made up before you ever executed the search warrant, hadn't it? A. I wasn't involved in writing the bill of information.

Q. Well, do you know whether it was written before the warrant was executed? A. I don't know for sure.

Q. It was done by your office, though, wasn't it? A. Yes.

[187] Q. And you knew at that time that you were particularly interested in transactions revolving around 13T? A. That's correct.

Q. That looked like to be the major charge that you were going to bring against Mr. Andresen at that time and you were looking for evidence to prove that crime out of Mr. Andresen's office, weren't you? A. That's true.

Q. And that's the reason why you put together – not you; when I say "you" I mean the State's Attorney's office – that's the reason for putting together the search warrant, to get in there and find evidence to prove the allegations regarding 13T, the false pretense? A. Yes.

Q. And you had suspicion regarding a number of other transactions that you didn't have a lot of evidence about, don't you–didn't you? A. That's true.

Q. Particularly the F.O. Day transaction regarding the deed of trust? A. I was more aware of particular lots.

Q. You were aware of the Holtzclaw– does that name mean anything to you? A. Yes.

[188] Q. And Warfield -- does that name mean something to you? A. Yes.

Q. And Pollitt? A. Yes.

Q. These are all people who were ultimately named as complaining witnesses in the indictment, are they not? A. Yes.

Q. You were aware of those people and the problems that they had before you went in Mr. Andresen's office looking for evidence? A. Yes, I was.

Q. And these people were not named in the affidavit that you prepared – that you assisted in preparing for the search warrant, were they? A. I only indirectly assisted in the preparing of the affidavit.

Q. But you did do title examinations? A. Yes.

Q. And you were an expert as far as the property and title search work? A. I had some background in that, yes.

Q. And you had more background than anybody else in the office regarding titles? A. Yes.

Q. You had sat in on a number of conversations with
[189] members of your office discussing possible charges arising out of Holtzclaw, Pollitt, Warfield, Lot 13 and the F.O. Day trust, is that correct? A. I think you're repeating yourself, because 25R, Warfield, was F.O. Day; the deed of trust that was late on that was F.O. Day. The same is true of 12S, the Pollitts.

Q. Were you also familiar with the Federline security agreement? A. When I walked in with the search party, what I had in mind with regard to 25R and 12S was F.O. Day, because I knew that that was two years late in each case.

Q. It was two years late as to the recording of the instrument, I assume? A. I knew in those two cases it was two years late in payment, which I had learned through their attorneys.

* * * * *

[191] MR. LAMB: Mrs. Nalls, you went in there with the warrant looking for, in your mind, anything which tended to prove either intent, motive or tend to be evidence in a crime of false pretense regarding Lot 13T? A. That's right.

Q. You were aware of the general investigation regarding a number of other lots and a number of other complaints, a number of other deeds of trust – you were fully aware of their existence and possible problems at that time? A. That's true. In the prosecutor's judgment they did not amount to probable cause, but they would be useful if knowledge was shown, to show absence of mistake.

Q. And as a result of your search you did find enough
[192] evidence to indict, didn't you? A. Yes.

Q. So when you went in there you were short of probable cause with respect to any of these other crimes, but you thought you had probable, or you did have probable cause to assume on Lot 13T, so you were getting in there so that you could look through all the files to find evidence as to Lot 13T only? A. That's correct. We were looking for – I'm sure you can understand this – with a title attorney with a lot of volume as Mr. Andresen had, that an argument of negligence might be quite plausible if it happened in only one case, so we were interested in any evidence tending to show that this happened repeatedly, because it would argue against the possibility of negligence or mistake.

* * * * *

[209] DIRECT EXAMINATION

BY MR. WERNER:

* * * * *

A. There is a handwritten document that apparently was in preparation for this listing of lots to be encumbered, one

of which was 13T. There is another handwritten document listing State National Bank to Clark-King. In my judgment it was relating to the same 13T – it says, "New case," and it looks like a direction to set up a file on the State National Bank trust that covered 13T.

Q. Was that some evidence that you felt was worthwhile? A. Yes, I felt if the handwriting were Mr. Andresen's, for example, that might show he gave direction on this trust which encumbered 13T. Now, there is a handwritten note that says, among other things, "Part of the consideration for the deed of trust is evidenced by previously contracted and existing debts." It mentions Quinby – I think Quinby is the name – Clark joint venture, and I knew that Mr. Clark had previously had another partner, and I knew that Clark was Mel Clark, the man who had executed the deed of trust encumbering Lot 13T, and apparently it related – my judgment at the time was that it related to State National Bank negotiations for that deed of trust that encumbered 13T.

Here is a document from Equitable Life Insurance Company – at least with their letterhead; it discusses a deed of trust securing, among other things, 13T. It is apparently to Chicago Title Insurance Company, care of Mr. Andresen, discussing – it's sort of a standard form letter discussing instructions to a settlement attorney, when he

[210] is empowered to disburse funds coming from this lot, but it specifically mentions Lot 13T as one of the lots to be encumbered by Equitable Life Insurance Company.

Q. What is the date of that letter? A. Apparently it's August 1967, apparently an early lien. Here's another handwritten note, very informal, on a yellow sheet; mentions State National Bank which I knew to be the deed of trust; I also knew that covered Lot 13T. It mentions

Mr. Covert whom I knew was handling that deed of trust; mentions Clark-King Construction Company, Incorporated, the party who sold 13T originally and who executed deeds of trust that continued to encumber that property for three years. It mentions again the amount of the State National Bank deed of trust and the rate of interest on the deed of trust that encumbered 13T. There is an adding machine slip that adds up charges and so on on the settlement sheet –

* * * * *

CROSS-EXAMINATION

BY MR. LAMB:

* * * * *

[213] Q. What about the other material? A. This is correspondence regarding a loan.

Q. In what year? A. I beg your pardon?

Q. In what year? A. In what year?

Q. What year is the correspondence? A. 1968.

* * * * *

[216] Q. In 1968? A. No; 1967.

Q. 1967, excuse me. Okay, the next document.

* * * * *

WITNESS: This is a handwritten note; I did not know at the time who wrote it – I suspected that Mr. Andresen had. It itemizes the lots that were going to be encumbered by deed of trust where he was the trustee, so this was a memorandum written by a trustee. It was in my judgment, I surmised, regarding the deed of trust where he was a trustee which encumbered 13T.

* * * * *

DIRECT EXAMINATION

BY MR. WERNER:

* * * * *

[226] MR. WERNER: Please continue with that file.

A. There is a handwritten note and copy of release, both sides, sent to Tobin. I was interested in knowing whether this release sent under Mr. Andresen's direction or perhaps under Mr. Zentz's direction – that it had in fact been released.

Q. That's a handwritten note? A. That's correct.

* * * * *

[227] This is a balance sheet. As I mentioned, I could locate no escrow books, and this mentions escrow, so I assumed that this is a balance sheet with the escrow holding with respect to 7T. As I mentioned, I was particularly interested in any evidence of intent to not use the purchaser's money to pay off existing encumbrances, and here on this settlement sheet is listed, and this is handwritten, some of the deeds of trust that I knew remained –in fact, the three that I knew remained on that property. Next to it is a bracket, and, handwritten, "Deferred." I knew two were paid late, I knew all three were released late, and when I saw "Deferred," that indicated that that was intentionally done. That seemed to me to strongly negative any argument of negligence in what I regarded as a similar transaction, Lot 13, Block T.

* * * * *

[230] Q. And that's Mr. Andresen's letterhead on top of that settlement sheet? A. That's right. I was interested in the handwriting on this also, for an analysis. And then there is a settlement sheet for the buyer again on 7T. Following that are handwritten versions. I was interested in a handwriting analysis. Interestingly, apparently there are many things listed on here that appear to be both subcontractors' bills and deeds of trust. Some of them are crossed off. I was thinking that apparently

he was paying these other bills with the money and there wasn't enough proceeds from the sale so he did not pay at that time the assignments that he had crossed off.

Then there is a handwritten copy of the buyer's settlement sheet.

* * * * *

[231] A. It does, only on this copy they're not circled. They are circled on the Xerox copy. There is a stub, apparently a check stub on here with Enterprise Federal Savings & Loan. Enterprise had a construction loan on this piece of property and a permanent loan. This is an accounting to Mr. Andresen. They had $36,000, approximately, outstanding on their construction loan. They were giving a permanent loan for approximately $38,000, so what they sent to Mr. Andresen was the difference, and it was from this that he disbursed monies at the time of settlement.

Q. Did, or did not disburse monies? A. Well, that's correct, but this is the money sent to be disbursed, to pay off encumbrances. Following are letters of assignment to people whom I knew to be subcontractors.

Q. Are those people named in any of those various sets of settlement sheets? A. Yes, and apparently

[232] some of them were paid–Minnix in particular; Standard Supply, Minnix, Mr. Federline, an assignment – I knew him to be a plumber; Maloney Concrete Company and Tassi Dry Wall Service. There is a handwritten note that says, "Pay Minnix," and has the amount, and "7T." I was interested in an analysis of the handwriting to see whether Mr. Andresen had instructed payment on this rather than payment on deeds of trust I knew to be encumbering the property. There are adding machine tallies and they have the case number right on them; one is listed for the seller and one for the buyer.

* * * * *

[275] MR. WERNER: There are some more pads there, are there not, Mrs. Nalls? A. Yes, and they just bring it up to a more recent date.

Q. So one pad is an older accounting and one a newer accounting. There is a third pad? A. That's correct.

[276] Q. By the way, before you go to the third pad, do any of those cases – are they familiar to you – were they familiar to you at that time, either by lot and block number or by purchaser's name, as any of those lots that were security for the Lumsden and State National deeds of trust? A. They were strikingly familiar. They were the lots I had been on notice for late releases; some of which I knew about late payments; others that I did not.

Q. Such as –? A. The Holtzclaws, the Pollitts, Clark-King; Antonelli, which is 13T; the Belts; the Daughertys; 211 McAuley Park, Mrs. Chepuras; Federline, 11 and 12T and 16S – they have essentially the same rationale in my mind as previous documents I have gone through. Now, the third pad is different. On this there are lots and blocks on the left-hand vertical column. Across the top are the Madison and Lumsden deed of trust, the State National Bank deed of trust, the F.O. Day deed of trust and the Federline deed of trust. My inference from this document was that this was a fairly recent attempt to tally up what was owing on these various lots on these four deeds of trust.

Q. When you say "owing," what do you mean? A. I didn't know whether it was owing or unreleased or what, but the amounts listed on here are curtailment amounts and the lots in question on the sheet are the very same lots that I had been on notice about, plus some other lots, and in my mind was an attempt to straighten out which

[277] ones had been taken care of and which had not. The reason I say "recent" is, there is a red mark on here that says, "Paid July 26, 1972," so my thinking was that this was at least updated through July 26, 1972.

Q. Are one of those lots listed on there, 13T? A. Well, they're actually – this looks like a continuation of this sheet, and on the continuation is 13T, Antonelli, and other very familiar lots – the Belts, the Daughertys, the Chepurases, the Holtzclaws, the Warfields, the Pollitts; and others which I had not been on notice for when I went in.

* * * * *

JOSEPH LAWRENCE
DIRECT EXAMINATION

BY MR. WERNER:

* * * * *

[290] Q. Okay. Now, in executing or in assisting in executing the search warrant, where, if you recall, did you find this particular document? A. If I'm not mistaken it was on the – well, it was in the office of Peter Andresen at 3700 Decatur Avenue.

Q. And do you recall where it was? A. It was within the files.

Q. Why did you seize it? A. Because I had knowledge of the prior state of the document, and Mr. Andresen's – Mr. Hitchen's allegations.

Q. And furthermore – A. Furthermore, I thought

[291] it was a forgery, and seized this document because I felt as though the original of the document would be the most proper item to use to verify that as far as submitting it for analysis.

Q. What kind of analysis? A. Typewriter analysis.

Q. So you seized that document during the course of the search? A. Yes, I did.

* * * * *

[292] CROSS-EXAMINATION

BY MR. LAMB:

Q. Agent Lawrence, you suspected a forgery situation when you entered Mr. Andresen's office under the warrant, and that's why you seized that original deed of trust?

A. I suspected a forgery situation when I went there, yes.

[293] Q. And that's why you seized the document?

A. I seized the document so that I might use the original document for analysis.

MR. LAMB: No further.

REDIRECT EXAMINATION

BY MR. WERNER:

Q. Mr. Lawrence, is it accurate to characterize what you knew at the time you went in there as suspicion?

A. Yes, it would be accurate.

Q. That's all you had? A. That's all I had, correct.

Q. Suspicion? A. Right.

* * * * *

[300] MR. LAMB: I'm ready to submit argument, Your Honor.

THE COURT: All right.

MR. LAMB: Your Honor, first of all, the original motion sounds the Fourth and Fifth Amendment rights, constitutional rights under the Fourth and Fifth Amendments. It sounds – the original motion itself sounds very broadly with respect to these two rights or rights that are granted to people under those two amendments, because the two amendments also include certain requirements with respect to validity of search warrants and affidavits presented to judges which support issuance of the search warrants.

First, I would like to start with a broad picture to the validity of the warrants with respect to whether they establish probable cause, and to allow the entry in and search of the property known as 3700 Decatur Avenue and the Plyers Mill Road address.

* * * * *

[304] In addition, Your Honor, with respect to the allegation contained in the affidavit, they allege as substantial proof of the fact that there has been a false pretense that when State National was contacted they allegedly had not been paid, when in fact prior to – within a month or two months prior to the execution of the affidavit, in the affidavit itself it acknowledges they had received payment and released Lot 13T, which I submit if Your Honor considers on the basis of a continuing offense, a continuing false pretense, the false pretense had in fact terminated and ceased by that time, because the release had been filed and the money had been paid to State National Bank to release their lien of record as it involved Lot 13T. Now, in addition –

THE COURT: That was when?

MR. LAMB: The money was paid State National on September 13th, I think, of 1972, and the release was obtained, executed and recorded with respect to Lot 13T, being some forty-five days or so prior to the swearing of the affidavit, yet the affiants include this in their application for the warrant as probable cause to believe a false pretense, according to Your Honor's theory, is being per-

[305] formed on the premises–

THE COURT: I didn't say that that was my theory– I just asked you–

MR. LAMB: Yes, Your Honor; in trying to support the continuing false pretense theory to justify that a crime

is now being committed on the premises, I submit that this defeats the alleged probable cause of that false pretense.

In addition to that, there is an allegation regarding the Madison National Bank note, known – formerly known as the Lumsden note, and as testimony I believe from Agent Moyer, and I stand to be corrected, that upon contacting Mr. Hecht in September of 1972, he acknowledged that he had in fact received a check in the amount of $2,000 designated as payment for Lot 13T, and that he was refusing to release Lot 13T because there was a challenge with respect to other underlying liabilities as to what that money should be applied to.

I submit to the Court that taking that testimony, taking the application for the search warrant and putting them together that at the time this affidavit was sworn to, Madison had been paid and they knew they had been paid in September – on September 13, 1972; and in fact, State National had been paid, each being paid forty-five days before the swearing by the affiants to the application for the warrant, which I submit if this were to be considered a continuing false pretense, this defeats that argument;

* * * * *

[307] Now, with respect to the format, particulars of the warrant itself, I will direct my attention in this argument only to 3700 Decatur Avenue and I would ask the Court to compare the application for the search warrant in that particular one to the affidavit in support of the search warrant for the Plyers Mill Road address, with particular reference to the facts, the probable cause which gives rise for a judge or magistrate in reviewing the application to believe that the articles sought are in fact upon the property intended to be searched at the time the warrant is to be executed. These have to be fresh facts, they have to

name the place with particularity that they are going to search; they have to identify with particularity the items to be seized. In the warrant as it applies to the 3700 Decatur Avenue address there is not a scintilla of evidence alleged in the application and affidavit in support of the search warrant to give rise to any reasonable belief to believe that any evidence they are seeking under the "wherefore" clauses was in fact being secreted in the address known as 3700 Decatur Avenue.

* * * * *

[309] Now, I submit that if you review the application and affidavit closely there isn't one paragraph nor one sentence which details why there is a reasonable ground to believe that any evidence whatsoever is contained in Mr. Andresen's office, particularly when they are at the same time issuing another search warrant for another address on the same basis. They are looking for the same thing in two different places and they are not even sure where they're going to find it, so they hit the two logical places Mr. Andresen might be holding the papers, and I submit that the mere statement in the opening parts of the application, that it is a law office located on Decatur Street, is not adequate – that is merely a conclusion of the affiant and, without more, does not justify a judge in finding reasonable or probable cause to believe the evidence sought is located in that address, particularly with the false pretense which was alleged to have taken place in July of 1972 and, at the very latest, under the concept of continuing false pretense, had stopped by September 13, 1972; and I submit that, on the basis of that, the warrant itself is deficient and fails, and the search and seizure of everything from the Decatur Street property – nothing should have been seized because the officers

and agents should not have been within the premises; the warrant should not have been issued.

* * * * *

[315] We submit that under the recent case law, including Hill versus Philpott and even citing U.S. v. Bennett, which is the State's case, in order to distinguish it from our facts, that the Court must conclude whether the evidence is testimonial or communicative. If it is, then the Court can decide, although it may be a reasonable search under the Fourth Amendment, it is important then to decide, if reasonable, does it violate the defendant's Fifth Amendment rights, and only when it is communicative or testimonial in nature would it be classified as a possible violation of the defendant's Fifth Amendment rights. This is taking into consideration Snell v. California, where they were dealing, I believe, with a blood test – they found that that was not testimonial or communicative. So I submit to the Court that the Fourth and Fifth have to work together; you have to go first to determine whether you have reasonable search; if you don't, you never reach the Fifth Amendment question.

In Warren v. Hayden they did not have a search warrant, they had an arrest; and they justified the arrest without warrant because of the circumstances and seizure incident to the arrest was justified because those items were not considered testimonial or communicative. And I submit in this case that they are – they are personal files of an attorney in his office, they are handwritten notes which

[316] have been testified to, that they suspected them to be those of Mr. Andresen; and I think it goes without saying from the testimony introduced previously that they were Mr. Andresen's files.

THE COURT: Do you agree, first of all, that the cases upheld that you can take a man's blood, you can pump

his stomach, cut his hair, do many other things, and they have held that those all would be not in violation of the Fifth Amendment?

MR. LAMB: Well, Your Honor, I think they have found specifically in those cases that the particular tests or evidence that has been taken did not –

THE COURT: Even scraped the skin, in one case.

MR. LAMB: I'm not familiar with that. I know when it comes down to handwriting exemplars, and in sex cases they've taken pubic hairs and hair samples and all that, and that has been accepted because, in and of itself it does not require the defendant to come in and give testimony to challenge the validity of what was taken, whereas when you get into written documents, books, records and things of that nature, you're talking about things which are similar in nature to confessions and personal papers as was cited in the Philpott case, in which he was a doctor and he kept sets of books with respect to his patients, and they seized those and they found that they were in

[317] fact testimonial or communicative, and although the seizure might be valid under the Fourth Amendment, when it gets to a consideration of the types of evidence seized under the Fifth Amendment, if it tends to require that the defendant take the stand and defend himself, it in fact violates his Fifth Amendment rights – it is forcing him to testify against himself because if they introduce the documents against him, he has no alternative but to testify to refute that. So it shifts the burden to testify over to the defendant, which is contrary to our current system of jurisprudence – he is not required to come forth and prove his innocence. By allowing these types of documents it would in fact be doing that, and I submit to the Court that the first determination, whether they are communicative or

testimonial – if they are, it is a violation of his Fifth Amendment rights, and in this case I submit that they are.

Now, the Court then, accepting Warren v. Hayden, we get on to the question of what can be seized even under an evidentiary warrant. I submit that the warrants we have before us now are general warrants and they are not particular in nature, and I read to the Court the language contained in the warrant itself, which I say is the binding language that applies, and the Court can disregard at this juncture, if the Court so chooses -- disregard the application altogether. That is merely the basis for the warrant. The question is, what is the legal authorization of those

[318] people to seize what they did, and it says, in essence, that, "There are now concealed upon said premises the following items pertaining to sale, purchase, settlement and conveyance of Lot 13, Block T, Potomac Woods subdivision, Montgomery County, Maryland," colon, and then it goes on further to define what they are allowing to be seized – title notes, title abstracts, all relating to 13T, and then it goes through and itemizes the types of things they're talking about, and then it gets down to the last four lines of that paragraph when it says, "and correspondence showing or tending to show a fraudulent intent and/or knowledge as elements of the crime of false pretense," and gives the violation of the article, "as amended and revised, together with other fruits, instrumentalities and evidence of a crime at this time unknown."

I submit to the Court with respect to both of those warrants that this is a general warrant, it isn't – they were very particular, if we take the warrant on its face, they were particular when it started as to 13T and those things directly affecting 13T, and I submit that that language, if the Court rules against me on the other argument– that

language is specific, and that's fine; and then you come up at the end and give a blanket authorization to seize anything and everything which in the mind of the searcher might be relevant – is a general warrant. That warrant permits that person to search, to enter into every file,

[319] everything in the office –

* * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS ON MERITS

CARL ZENTZ
DIRECT EXAMINATION

BY MR. WERNER:

* * * * *

[315] Q. And do you have any other title searchers working at Mr. Andresen's office? A. Yes.

Q. And were they under your control and supervision? A. Yes.

Q. But those documents are all in your handwriting? A. Yes, these are. I don't know about this one.

Q. I would offer into evidence 1B, IC and ID.

Lamb: I would object, your Honor.

Court: On what ground.

Lamb: The grounds that have been raised previously at the pretrial motions and from the standpoint that his capacity related to Mr. Andresen; personal work product.

Court: We went through all that before?

Lamb: Yes, Your Honor.

Court: Objection overruled.

Q. Court's indulgence (Pause). With respect to 1B, there is nothing written alongside 7T or 13T. What would that indicate to you on looking at that document. A. There would be . . . .

Lamb: Your Honor, I would object. The document speaks for itself. Unless he can say specifically why he left it out.

Court: I will sustain the objection.

Q. I show you what is marked for identification as State's Exhibit 1E and ask you if you can identify that
[316] document? A. Yes. It is a list that I made up.

Q. Is it in your handwriting? A. Yes, it is.

Q. Do you have a general name that you give that list? A. Not really, no.

Q. For what purpose was it made up? A. It was made up by me to provide myself with a quick, fairly quick summary of what deeds of trusts were still in existence on certain lots at certain dates.

Q. Was that kept in the basic file for Potomac Woods? A. I think so; yes.

Q. Okay. The State would offer it in evidence.

Lamb: I would offer the same objection, your Honor.

Court: Objection overruled.

Q. Mr. Zentz, some of these notations have X's through them. What does that indicate? A. I just when they were released, I just marked through them so I wouldn't get confused.

Q. Now, can you tell through what date this document was updated? A. Yes, sir.

Q. What date was it updated? A. It appears to be updated through April 25, 1972.

Q. 1972, is that what you said? A. That's right.

[317] Q. Would you look please at Lot 7T. Indicate if there exists on that list without being x'd out any deeds of trust?

Lamb: Your Honor, I would object to the question from the standpoint that again the document

would speak for itself and in essence they are trying to allow him to give an opinion as to what the condition of that lot was as to releases and they want him to testify from the document.

Q. If the Court please, the document, of course, speaks for itself, but I want certain selected sections of it only brought to the attention of the jury and he is merely reading what the document reflects.

Court: I will overrule the objection. You may testify.

Q. 7T. A. This shows . . . . according to this there is one deed of trust.

Q. Please keep your voice up. A. According to this, there appears to be one deed of trust that had not been released as of this date.

Q. What does the notation say? A. It says Lot 7, Block T, Section 10, Liber 3773, Folio 598, State National.

Q. Is that all it says – State National? A. That is all that says; yes.

Q. Do you know what that instrument is that is referred to in there? Are you familiar with it? A. I only noted the deed of trust on here so I . . . .

Q. I understand that. Are you familiar with that instrument? A. Well, I have seen it before.

[318] Q. Do you know in what amount it was? A. Not offhand.

Q. Okay. With respect to Lot 13T, are there any un-x'd notations of yours on that? A. Yes.

Q. How many? A. Two.

Q. And what do they say with respect to Lot 13T? A. They say, . . . well, no. 1, it is Liber 3773, folio 598, State National, and the second one is Liber 3797, folio 799, Lumsden.

Q. With respect, ... by the way, was there check marks signed here in different colors? What do they indicate? A. I really don't remember.

Q. Were the x's x'd with these deeds of trust all put on there at the same time? A. No.

Q. Were they all put on there in two times or three times or when? A. It is hard for me to tell. That thing wasn't updated after April 25, 1972. That is over a year ago and I really don't remember.

* * * * *

GEORGE YOUNG
DIRECT EXAMINATION

BY MR. WERNER:

* * * * *

[482] Q. Okay, I show you what is marked for identification, State's Exhibit 20E. A. That looks like the contract.

Q. Do you have a copy of it? A. Yes.

Q. And would you compare it? A. This is a ratified copy you're showing me. The first one drawn wasn't ratified, and then it was ratified.

Q. Did you later see it ratified? A. Yes.

THE COURT: What do you mean by "ratified"?

A. Accepted by the sellers.

MR. WERNER: Does that appear to be an accurate copy of it, or an accurate original? A. Yes.

MR. WERNER: I would offer it in evidence.

THE COURT: Is there any objection?

MR. LAMB: Subject to the objection that I raised pretrial, Your Honor.

THE COURT: All right. It will be admitted.

* * * * *

[485] Q. I show you what has been marked State's Exhibit 3A and ask if you recognize this document. A. This

looks like the settlement statement for the buyer.

Q. Do you have a photocopy of it? A. Yes. The only thing is, it's signed by Audrey Young, and I have copies that are signed by myself, of the same statement.

Q. Do you recognize your wife's signature? A. Yes.

[486] Q. That is your wife's signature on the marked copy?

A. Yes.

Q. And your copies were signed by yourself?

A. Myself. It could have been that at the table I signed some, and Audrey might have signed some, or Mrs. Young.

Q. That is your signature? A. Yes.

Q. And otherwise conforms to your copy? A. Yes.

MR. WERNER: I offer it in evidence.

THE COURT: Is there any objection?

MR. LAMB: Subject to the same objection, Your Honor.

THE COURT: Well, now –

MR. LAMB: To be quite honest, to preserve the record – I apologize, Your Honor.

THE COURT: All right. I don't think it's necessary; I think the record is preserved without renewing your motion. But you're not contending that there are any items here that had not been ruled on?

MR. LAMB: No, Your Honor.

THE COURT: It will be admitted.

* * * * *

Supreme Court, U. S.
FILED
SEP 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS B. BURCH,
Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
GILBERT ROSENTHAL,
Assistant Attorney General
of Maryland,
Counsel for Respondent,
One South Calvert Building,
Calvert and Baltimore Streets,
Baltimore, Maryland 21202.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
PRELIMINARY COMMENTS	1
OPINION BELOW	1
JURISDICTION OF THE COURT	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT	3
ARGUMENT	4
I. The introduction into evidence of the handwritten notes and memoranda, books and records of an attorney-at-law, which were seized from the desk and files of the office of the attorney under a search warrant held to be otherwise reasonable, does not offend the privilege against self-incrimination under Amendment V to the Constitution of the United States under the facts and circumstances of the instant case	5
II. The search of Petitioner's offices was not violative of Amendment IV to the Constitution of the United States	13
(A) Search warrants were introduced into evidence	13
(B) The warrants in the instant case did not amount to "general" warrants	13
(C) It was not impossible for the trial judge who issued the warrants to	

PAGE

have made the finding that probable cause was demonstrated that a crime was being committed on the premises 14

(D) The principals and prefaces annunciated by this Court in *Warden v. Hayden, Id.*, were not violated by the Court of Special Appeals in upholding the admission of certain items into evidence which were obtained by the search and seizure in question 15

(E) The two-pronged test of credibility-liability and trustworthiness of the non-swearing informants was satisfied 17

III. The Petitioner was not denied his rights to due process and equal protection of the laws as guaranteed by Amendment XIV of the Constitution of the United States because he allegedly did not receive a fair trial because of the cumulative effects of the actions of the prosecution and the State's courts 18

CONCLUSION 23

TABLE OF CITATIONS

Cases

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1974) 17

Andresen v. Bar Association of Montgomery County, 269 Md. 313, 305 A.2d 845 (1973) .. 22

Andresen v. Salter, et al, 269 Md. 494, 307 A.2d 485 (1973) 22

PAGE

Andresen v. State, 24 Md. App. 128, 331 A.2d 78 (1975) 1

Baumgartner v. State, 21 Md. App. 251, 319 A.2d 592 (1974) 18

Bellis v. United States, 417 U.S. 85, 94 S. Ct. 2179 (1974) 12

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) 19

Couch v. United States, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973) 10

Hill v. Philpott, 445 F.2d 144 (7th Cir., 1971), *cert. den.* 404 U.S. 991 (1971) .....*passim*

Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927) 11, 12

Nichols v. State, 6 Md. App. 644, 252 A.2d 499 (1969) 19

Nye & Nissen et al., v. United States, 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919 (1949) 16

Polisher v. State, 11 Md. App. 555, 276 A.2d 102 (1972) 16

State v. Babb, 258 Md. 547, 267 A.2d 190 (1970) 22

Sugarman v. United States, 249 U.S. 182, 39 S. Ct. 191, 63 L. Ed. 550 (1919) 19

United States v. Beck, 511 F.2d 997 (6th Cir., 1975) 6

United States v. Blank, 459 F.2d 383 (6th Cir., 1972), *cert. den.*, 409 U.S. 887, 93 S. Ct. 111, 34 L. Ed. 2d 143 (1972) .....*passim*

United States v. Murray, 492 F.2d 178 (9th Cir., 1973) 9, 11

United States v. Scharfman, 448 F.2d 1352 (2d Cir., 1971) *cert. den.*, 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 789 (1972) 8, 11, 12

PAGE

United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741 (1965) 14, 15

Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) 15, 16

Statutes

Annotated Code of Maryland:

Article 5, Section 5 3

Article 27, Section 551 ..... 3, 14

Courts and Judicial Article—

Section 12-201 3

Section 12-203 3

U.S.C.A., Title 28, §1257 (3) 2

United States Constitution:

Amendment IV ..... *passim*

Amendment V ..... *passim*

Amendment XIV ..... *passim*

Rules

Federal Rules of Criminal Procedure:

Rule 16 20

Maryland Rules of Procedure:

Rule 728 20

Miscellaneous

58 Am. Jur. 2d *New Trial* §175, p. 391 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court dated August 14, 1975.

OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland (Appendix A. 1-88 of Petition) is reported in 24 Md. App. 128, 331 A.2d 78 (1975). Neither the denial

of the motion for writ of certiorari by the Court of Appeals of Maryland (Appendix A. 92 of Petition), nor the denial of a Motion for Reconsideration of the Petition for Writ of Certiorari by the Court of Appeals of Maryland (Appendix A. 93 of Petition) are officially reported.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of Title 28, U.S.C.A., §1257 (3).

QUESTIONS PRESENTED

I. May an attorney-at-law, who is a sole practitioner, invoke his privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction of his[1] handwritten notes and memoranda, books and records, which were seized from his desk and files in his[2] office, under a search warrant held to be otherwise reasonable, into evidence against him at his criminal trial?

II. Was the search of Petitioner's offices violative of Amendment IV to the Constitution of the United States?

III. Was the Petitioner denied his rights to due process and equal protection of the laws as guaranteed by Amendment XIV to the Constitution of the United States, because he allegedly did not receive a fair trial because of the cumulative effects of the actions of the prosecution and the State courts?

[1] and [2] The Respondent has adopted the first question presented by the Petitioner, with the exception that the word "personal" has twice been deleted purposely.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner alleges that the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States are involved; as well as Article 5, Section 5 and Article 27, Section 551 of the Annotated Code of Maryland (1957); and Sections 12-201 and 12-203 of the Maryland Courts and Judicial Article of the Annotated Code of Maryland (1974).

STATEMENT

On November 1, 1972, an information was filed against the Petitioner, an attorney-at-law in Montgomery County specializing in the handling of real estate settlements, charging Petitioner with four counts of false pretenses. On November 16, 1972, the Petitioner was indicted by the Montgomery County Grand Jury on seventeen additional charges. The indictment and the information were consolidated for trial. The Petitioner elected to proceed with a jury trial, and the jury found the Petitioner guilty under Counts One and Two of Bill of Information No. 3100, and Counts Three, Four, Seven, Eight, Eleven and Twelve of Indictment No. 3103. The Petitioner was sentenced to eight concurrent two-year sentences, thereby making a total sentence of two years.

In his appeal to the Court of Special Appeals of Maryland, that Court reversed the jury verdict as to Count Two of Bill of Information No. 3100 and Counts Four, Eight and Twelve of Indictment No. 3103, and affirmed the other four convictions.

ARGUMENT

The issues in the instant case are relatively narrow and do not warrant review by this Court on certiorari. By virtue of a valid search warrant, certain business records were seized from the law offices of the Petitioner. The fact that some of the items seized may have incriminated the Petitioner would not violate the Petitioner's privilege against self-incrimination under Article V to the Constitution of the United States. Nor was the search of the Petitioner's offices violative of Amendment IV to the Constitution of the United States because the search was reasonable and, under the facts of Petitioner's case, was warranted. A review of all of the facts as they are set forth in the Argument contained herein illustrates that neither Amendment IV nor Amendment V was violated. A further review of the facts will illustrate that the Petitioner was not denied his right to due process and equal protection of the laws as guaranteed by Amendment XIV to the Constitution of the United States, and that the Petitioner did receive a fair trial.

It is patently clear from the record that the Court of Special Appeals of Maryland was manifestly correct in its decision. There is no important question of federal law requiring decision by this Court, and the Petition for Writ of Certiorari should be denied.

I.

THE INTRODUCTION INTO EVIDENCE OF THE HANDWRITTEN NOTES AND MEMORANDA, BOOKS AND RECORDS OF AN ATTORNEY-AT-LAW, WHICH WERE SEIZED FROM THE DESK AND FILES OF THE OFFICE OF THE ATTORNEY UNDER A SEARCH WARRANT HELD TO BE OTHERWISE REASONABLE, DOES NOT OFFEND THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES UNDER THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE.

The thrust of Petitioner's argument appears to be directed at the alleged inconsistency between the decisions in *Hill v. Philpott*, 445 F.2d 144 (7th Cir., 1971), *cert. den.* 404 U.S. 991 (1971) and *United States v. Blank*, 459 F.2d 383 (6th Cir., 1972), *cert. den.* 409 U.S. 887, 93 S. Ct. 111, 34 L. Ed. 2d 143 (1972). In *Hill*, the Seventh Circuit held in a two-to-one decision that the production of a taxpayer's *personal* books and records should properly be refused on the basis of a Fifth Amendment privilege against self-incrimination, even though the same had been seized pursuant to a valid search warrant. The rationale of the majority in *Hill* was grounded upon the legal premise that the taxpayer would have been afforded his Fifth Amendment right against self-incrimination had the Government sought by subpoena or summons the same personal books and records of the taxpayer.[3]

[3] The dissent in *Hill* held that the papers sought were not so intimately confidential as to enjoy a superlative privacy which would be protected from seizure upon an adequately grounded warrant. In describing the character of the papers, Judge Fairchild reasoned that the records in question were "maintained for business and professional purposes, with the knowledge and assistance of employees, and the manner in which they were alleged kept and used, made them, in a sense, instrumentalies of the tax evasion offense claimed." *Hill v. Philpott, Id.*, at page 150.

In *Blank,* decided nearly one year thereafter, the Sixth Circuit held that worksheets of a sports and horse-book betting business which was seized under an admittedly valid search warrant would not be suppressed on Fifth Amendment grounds because they were not personal communications but were business accounts; that since they were not privately recorded and privately held thoughts or descriptions of events, these business records of which other persons would have knowledge were admissible in evidence if the same were obtained through a valid search warrant. The Sixth Circuit rejected the rationale of the majority decision in *Hill* that there is no distinction between records sought by subpoena and records sought by a search warrant. The rationale of the Court in *Blank* was set forth at page 385:

> "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena *compels* the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant." (Emphasis added)

Although admittedly a Sixth Circuit case, *United States v. Beck,* 511 F.2d 997 (6th Cir., 1975) appears to be the most recently reported Circuit Court of Appeals case pertaining to the issue at Bar. In reaffirming its position in *Blank,* the Court stated at pages 1002-1003:

> "Admitting properly seized 'personal papers' cannot violate the Fifth Amendment privilege against self-incrimination. Unlike an order which 'compels' production of evidence, *Boyd, supra,* 116 U.S. at 618, 6 S. Ct. 524, 29 L. Ed. 746 the owner of a notebook uncovered in a search in his absence is

under no compulsion. See United States v. Blank, 459 F.2d 383, 385 (6th Cir. 1972), rev'g 330 F. Supp. 783 (N.D. Ohio 1971); United States v. Murray, 492 F.2d 178, 191 (9th Cir. 1973); United States v. Scharfman, 448 F.2d 1352, 1355 (2d Cir. 1971), cert. denied, 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 789 (1972). But see Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971). Being unaware of the search, he has no choice. Comment, The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations 6 Loyola (Cal.) L. Rev. 274, 290 n. 93 (1973). Couch v. United States, 409 U.S. 322, 327-336, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973), established that mandated cooperation, rather than the 'privacy' of the owned papers, is the *sine qua non* of the privilege against self-incrimination. See Comment, The Protection of Privacy by the Privilege Against Self-Incrimination: a Doctrine Laid to Rest?, 59 Iowa L. Rev. 1336 (1974). Similarly, though 'testimonial' evidence was seized in United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), the Court sustained the admission of such uncompelled evidence without feeling even the need to discuss the privilege against self-incrimination.

"Though the overall search and seizure is proper and though there is no compelled cooperation, the search and seizure of the papers must also be 'reasonable.' As the Second Circuit so aptly said,

> 'The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a 'diary' whose cover page bore the title 'Robberies I Have Performed.' Similarly the abhorrence generally felt with respect to 'rummaging' through the contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view.' United States v. Bennett, 409 F.2d

888, 897 (2d Cir.), cert. denied sub. nom., Haywood v. United States, 396 U.S. 852, 90 S. Ct. 113, 24 L. Ed. 2d 101 (1969), Thomas v. United States, 402 U.S. 984, 91 S. Ct. 1670, 29 L. Ed. 2d 149 (1971).

The 'search' of the spiral notebook for its communicative value and for fingerprints, see United States v. Hill, 454 F.2d 282 (9th Cir. 1972), under the present circumstances, was hardly unreasonable in that, as in *Bennett*, there was no extensive 'rummaging.' Though appellate counsel has characterized the notebook as appellant's 'private diary' (Appellant's Reply Brief at 22), the 'diary' consisted of just one page, the first page, in fact, of the notebook. United States v. Gargotto, 510 F.2d 409 (6th Cir. 1974), sustained the reasonableness of a search involving much greater 'rummaging.' Cf. *Philpott, supra* (more than thirty cartons of records seized); United States v. Zive, 299 F. Supp. 1273 (S.D.N.Y. 1973) (at least seven desk or file drawers.)"[4]

A review of the pertinent cases cited in *Beck* reveals that the Second Circuit and Ninth Circuit also have adhered to the proposition set forth in *Blank, i.e.,* the seizure of business records by virtue of a warrant reasonable under the Fourth Amendment requirements may be introduced into evidence over a Fifth Amendment objection. In *United States v. Scharfman,* 448 F.2d 1352 (2nd Cir., 1971), *cert. den.* 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 789 (1972), there was a search and seizure warrant issued for the recovery of furs from a highjacked fur shipment. During the course of the seizure of the furs, index cards and a consignment memorandum book were seized. In disposing of this point, the Court stated at page 1355:

[4] Testimony in the instant case revealed a seizure of less than 5% of Petitioner's files.

"Scharfman also argues that the memo book, containing entries written in his own hand, should have been suppressed because the fifth amendment would permit him to refuse to produce such evidence if he had possession. His analogy is inapposite. We held in United States v. Bennett, 409 F.2d 888, 896, cert. denied, sub nom. Jessup v. United States, 396 U.S. 852, 90 S. Ct. 376, 24 L. Ed. 2d 256, reh. denied, sub nom. Haywood v. United States, 396 U.S. 949, 90 S. Ct. 376, 24 L. Ed. 2d 256 (1969), that 'the Fourth Amendment does not protect broadly against the seizure whose compulsory production would be forbidden by the Fifth.'"

The Ninth Circuit, in *United States v. Murray,* 492 F.2d 178 (9th Cir., 1973) commented at page 191:

"3. *Seizure of address book.* Murray argues that the seizure and use in evidence of his address book and entries therein violated his Fifth Amendment privilege against self-incrimination. Murray relies primarily upon an observation by Justice Bradley in Boyd v. United States, 116 U.S. 616, 633, 6 S. Ct. 524, 29 L. Ed. 746 (1886), to the effect that the seizure of a person's private books and papers to be used in evidence against him is not substantially different from compelling him to be a witness against himself.

"*Boyd* involved a self-incrimination problem because the defendant was required by court order to produce a self-incriminating invoice. No such circumstance is present here. Actually, Murray's address book could have been seized as an instrumentality of the crime under the law as it existed prior to Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), which overturned the 'mere evidence' rule. *Hayden,* of course, liberalized the rule as to what items may be seized.

"In *Hayden,* however, the court reserved the question of whether, in a search and seizure otherwise valid, the authorities could, in view of the privilege against self-incrimination, take items

which are 'testimonial' or 'communicative' in nature. *See Hayden,* at 302-303, 87 S. Ct. 1642. But in United States v. Bennett, 409 F.2d 888, 896 (2d Cir. 1969), the Second Circuit held that such items can be taken during a lawful search and seizure and are admissible. We agree."

In addition to the above, this Court in *Couch v. United States,* 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 548 (1973) also appears to hold that there is a distinction between an order to produce records and the seizure of records under the authority of a warrant. In addition, in footnote 10 this Court also appeared to make the further distinction between *personal* papers and other papers in the handwriting of the accused, stating:

"A later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.*' United States v. White, 322 U.S. 694, 699, 64 S. Ct. 1248, 1251, 88 L. Ed. 1542 (1944)." (Emphasis in the original)

It is for this reason that the Petitioner's reliance on *Hill,* as well as Petitioner's contention itself, are without merit. The papers seized in the instant case were not *personal* within the contemplation of the various cases. Rather, the papers seized were no more than records kept in the ordinary course of Petitioner's practice of law and reflected such items as deeds, mortgages, deeds of trust, memoranda of settlements, and the like. These were papers which were prepared as a necessity for clients, rather than papers of a purely personal nature which referred only to the Petitioner.

At first blush, it might appear as though the respective holding of the Seventh Circuit in *Hill* is

inconsistent with the holdings of the Sixth Circuit in *Blank,* the Second Circuit in *Scharfman* and the Ninth Circuit in *Murray,* which inconsistency might warrant the granting of certiorari. However, this Court appears to have already held that items lawfully seized as an incident to a valid arrest are admissible in evidence over a Fifth Amendment objection in a situation wherein the personal papers were so closely related to the business that the papers were determined to be business records. In *Marron v. United States,* 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927), Marron claimed that a ledger and certain bills for gas, electric light, water and telephone services, which were obtained through an illegal search and seizure, should have been excluded because of a violation of his Fourth and Fifth Amendment rights. After holding that the items in question were not admissible pursuant to the search warrant because the same were not particularly described as things to be seized (intoxicating liquors and articles for their manufacture were described in the warrant), this Court allowed the items to be introduced in evidence for the following reason:

"The bills for gas, electric light, or, and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest." 48 S. Ct. at 77; 275 U.S. at 199.

It is, therefore, evident that this Court has already ruled that the Fifth Amendment privilege against self-incrimination will not attach in situations where evidence is otherwise legally obtained. While it may be true that the evidence in *Marron* was admissible by virtue of a valid arrest, the Respondent would submit

that the seizure of such items pursuant to a search warrant would be admissible in evidence by analogy. The records in *Marron* were allowed in evidence as closely related to the business of Marron. In similar fashion, the records seized from the Petitioner were actually used in carrying on the Petitioner's profession as an attorney-at-law. Furthermore, the seized records were not personal by any stretch of the imagination, and even though the papers may have been in Petitioner's handwriting, the seized records were nothing more than business records.

As a further illustration that certiorari should not be granted in the instant case by virtue of the cases previously decided by this Court, it need only be pointed out that this Court has previously denied certiorari in *Blank* (6th Circuit) and *Scharfman* (2nd Circuit).

Petitioner's reliance upon *Bellis v. United States*, 417 U.S. 85, 94 S. Ct. 2179, ___ L. Ed. 2d. ___ (1974) is totally unfounded. Unlike the facts in the instant case where a warrant issued, Bellis was subjected to a *subpoena* for certain partnership records. The Respondent acknowledges the difference between a valid search and seizure warrant on the one hand and a subpoena on the other hand. In the former, an individual is not compelled to incriminate himself; in the latter, an individual would have to bring the records to the proper governmental authority and might thereby be incriminating himself.

The Respondent would take issue with the blunt statement of the Petitioner that this Court in *Bellis* "cited with unanimous approval" the holding in *Hill* (Br. 16). True, this Court in *Bellis* apparently cited *Hill* as holding that the privilege against compulsory self-incrimination applies to business records of a sole practitioner as well as to his personal documents containing more intimate information about the individual's private life. However, the Respondent would submit that the use of a citation is a far cry from an unanimous statement that no business records of a sole practitioner are subject to a valid search and seizure warrant.

For the foregoing reasons, the Respondent would submit firstly that the items seized under the valid search and seizure warrant were not personal to the Petitioner, and were therefore admissible into evidence. Secondly, unlike records requested for the issuance of a subpoena which might compel the person to give incriminating evidence against himself, items legally seized under the authority of a valid search and seizure warrant in accordance with the Fourth Amendment do not offend the Fifth Amendment guarantee against compelled self-incrimination.

II.

THE SEARCH OF PETITIONER'S OFFICES WAS NOT VIOLATIVE OF AMENDMENT IV TO THE CONSTITUTION OF THE UNITED STATES.

(A) *Search Warrants Were Introduced Into Evidence.*

The Respondent does not take issue with the authority cited by the Petitioner that a search warrant under which the evidence was obtained must be introduced in evidence (Br. 23). The short answer to Petitioner's contention lies in the fact that the search warrant was apparently introduced into evidence (A. 28-33).

(B) *The Warrants in the Instant Case Did Not Amount to "General" Warrants.*

The Petitioner appears to acknowledge that the warrants in the instant case described with particular-

ity the items to be seized. However, Petitioner argues that the addition of the words "together with other fruits, instrumentalities and evidence of crime at this time unknown" would cause the particular warrants to become general warrants. In explaining the additional words, the Court of Special Appeals concluded:

> "A reading of the warrants *in full*, however, makes it apparent that the suspect phrase is tied explicitly to those items which might show a violation of the false pretenses law with respect to the sale of Lot 13T" (A. 34). (Emphasis added)

The Respondent adheres to the reasoning of the Court of Special Appeals of Maryland, especially in light of the fact that this Court has oft times held that an affidavit should be interpreted in a common-sense and not a hypothetical manner, and that the resolution of doubtful or marginal cases should be largely determined by the preference accorded to warrants. *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741 (1965).

(C) *It Was Not Impossible For The Trial Judge Who Issued the Warrants to Have Made The Finding That Probable Cause Was Demonstrated That A Crime Was Being Committed on the Premises.*

Petitioner contends that since one of the elements of the crime of false pretenses includes a false representation of *a past or existing fact*, it is impossible for the affidavit in the warrant to set forth that there is probable cause to believe that the laws relating to false pretenses *are being* violated upon the premises. Petitioner believes that it is not possible for a crime to be *presently* being committed, when one of the elements of the crime itself is a false representation of a past or existing fact. However, the above allegations are merely a play on words. Section 551 of Article 27 of the

Annotated Code of Maryland (1974 Cum. Supp.) provides that a search warrant may issue under a proper application and affidavit for any building wherein property subject to seizure under the criminal laws of the State is situated or located. It is apparent that the use of the phrase in the affidavit that the crime was presently being committed relates to the documents which were then on the premises. To hold otherwise, a warrant could never issue in a case of false pretenses because the facts represented would have already been acts of past history.

In addition to reliance upon *Ventresca* with relation to the preference to be afforded warrants, the Respondent also submits that *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) is sufficient to dispell the argument of the Petitioner. *Hayden* made it clear that any evidence of a past crime is subject to seizure under the Fourth Amendment.

(D) *The Principals and Prefaces Annunciated By This Court in Warden v. Hayden, Id., were not Violated By The Court of Special Appeals in Upholding The Admission of Certain Items into Evidence Which Were Obtained By the Search and Seizure in Question.*

Petitioner takes issue with regard to several other items seized, which did not specifically relate to Lot 13T. In particular, the Petitioner refers to the opinion of the Court of Special Appeals:

> "Several other items seized, although not relating to Lot 13T specifically, showed a general pattern of operation on the part of the appellant with respect to unreleased deeds of trust on other properties in Potomac Woods and, therefore, negated any suggestion of mere mistake or lack of

> knowledge on his part when it came to his false representations as to Lot 13T. Because of their bearing on the critical question of the appellant's *mens rea,* we hold that they too were seizable evidence under the warrants. Alternatively, they were evidence of other crimes, their character as criminal evidence obvious to the searching party by the requisite standard of probable cause, and, therefore, seizable warrantlessly under the Plain View Doctrine." (A. 47-48).

Relying upon *Warden v. Hayden, supra,* the Petitioner contends that the papers seized "were not used by the prosecutor in an attempt to establish *mens rea* as to false pretenses." (Br. 28). The crime of false pretenses is committed when a person (1) by making a false representation of a past or existing fact (2) with intent to defraud, and (3) with knowledge of its falsity, (4) obtains any chattel, money or valuable security from another (5) who relies on the false representation (6) to his detriment. *Polisher v. State,* 11 Md. App. 555, 276 A.2d 102 (1972). By the very definition and elements relating to false pretenses, it is incumbent upon the prosecutor to show that there was an intent to defraud, rather than a mistake on behalf of the accused. For this reason, it was permissible in the instant case for the other items seized to be introduced into evidence to show a general pattern of operation, rather than a mistake, on the part of the Petitioner with respect to unreleased deeds of trust on properties other than Lot 13T. This Court has also adhered to the same doctrine. In *Nye & Nissen, et al. v. United States,* 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919 (1949), a case involving the substantive crime of false pretenses, this Court cited with approval the introduction of evidence of crimes similar to those charged in order to prove the guilty

intent of the accused. At page 618 of 336 U.S., this Court stated:

> "The evidence showed the presentation of eleven other false invoices. This was part of the evidence received in support of a conspiracy count. The trial court also admitted it at the conclusion of the case 'for the sole purpose of proving guilty intent, motive, or guilty knowledge' of the defendants. Evidence that similar and related offenses were committed in this period tended to show a consistent pattern of conduct highly relevant to the issue of intent."

(E) *The Two-Pronged Test of Credibility-Liability and Trustworthiness of the Non-Swearing Informants Was Satisfied.*

Relying upon *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1974), the Petitioner challenges the veracity of the informants set forth in the affidavit to the warrant. As aptly pointed out by the Court of Special Appeals in its opinion, *Aguilar* related to the rule set forth for the establishing of the credibility of unnamed police informers rather than disinterested civilian sources of information (A. 42-44). In the instant case, secondary sources of information were all named and identified in the affidavit. These named individuals were either victims of the crime, disinterested civilian sources of information, or other law enforcement officers. For this reason, the Petitioner's contention is without merit.

III.

THE PETITIONER WAS NOT DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES BECAUSE HE ALLEGEDLY DID NOT RECEIVE A FAIR TRIAL BECAUSE OF THE CUMULATIVE EFFECTS OF THE ACTIONS OF THE PROSECUTION AND THE STATE'S COURTS.

The Petitioner has set forth fifteen "problems encountered" by him, which he contends denied him due process of law when considered with the closing remarks of the prosecutor. Taken individually or collectively, the Petitioner's Fourteenth Amendment rights were not violated.

1. Petitioner refers to prejudicial pre-trial publicity which required removal of his trial from his home county to another county in the State of Maryland. Since Petitioner's motion for removal was granted, it is difficult to comprehend any error whatsoever.

2. Petitioner refers to an initial "overcharge" of the indictments, a denial for request of a severance, and an abandonment of most of the charges without proof. The Respondent is unable to find any authority (nor is any authority advanced by the Petitioner) which holds that there is a limit to the number of counts and/or indictments to be filed against an accused. The abandonment of the charges because of a lack of proof merely illustrates that the Petitioner was afforded due process of law. With regard to the motion for severance, this motion lies within the sound discretion of the trial judge, and will not be overruled unless there is an abuse of discretion. *Baumgartner v. State,* 21 Md. App. 251, 319 A.2d 592 (1974). As gleaned from that portion of the trial judge's opinion (A. 69), it is patently clear that the trial judge did not abuse his discretion in denying the severance.

3. With reference to Petitioner's motion for a continuance, the granting or denial of a continuance also lies within the sound discretion of the trial judge. *Nichols v. State,* 6 Md. App. 644, 252 A.2d 499 (1969). The facts relating to the continuance set forth in the opinion (A. 68) obviously show a lack of an abuse of discretion on the part of the trial judge.

4. As noted in the opinion of the Court of Special Appeals (A. 73-75), Petitioner's motion for a Court En Banc was not timely filed.

5. Petitioner acknowledges that the issues concerning the warrants in the instant case have been previously discussed in Argument herein (Br. 31).

6. With reference to the instructions, the Respondent would refer to the opinion of the Court of Special Appeals which more than adequately illustrates that there was no error in the instructions or in the refusal to grant specific instructions. The exact language of requested instructions need not be adopted, but it is sufficient that they are or have already been given in substance. *Sugarman v. United States,* 249 U.S. 182, 39 S. Ct. 191, 63 L. Ed. 550 (1919).

7. Relying upon *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Petitioner contends that a written immunity agreement had not been revealed to the Petitioner even after a request for discovery. However, the immunity agreement was not exculpatory nor material evidence within contemplation of *Brady,* nor was it suppressed by the prosecution within the contemplation of *Brady.* The immunity agreement was introduced into evidence without objection (A. 65). Clark, with whom the immunity agreement was made, was listed as a State witness in discovery proceedings.

Petitioner also argues that he should have been advised of his *Miranda* warnings because Petitioner conferred frequently with Clark. As pointed out by the Court of Special Appeals (A. 65):

> "The point is moot, since no such conversations were introduced in evidence."

8. Assuming *arguendo* that there was a tardy response to a granted bill of particulars, or that the response was evasive and incomplete with regard to proper addresses of the 54 respective witnesses, Rule 728 of the Maryland Rules of Procedure carries no exclusionary sanction for non-compliance. In addition, the Petitioner could have requested a continuance in order to have adequate time to review the responses. Having failed to do so, the Petitioner cannot now claim error. See also Rule 16 of the Federal Rules of Criminal Procedure.

9. Petitioner argues that his Motion for New Trial should have been granted. The Respondent refers to and relies upon that quoted portion of 58 Am. Jur. 2d, *New Trial* § 175 at p. 391, which appears in the opinion of the Court of Special Appeals (A. 80).

10. Petitioner contends that he was sentenced under criticism for maintaining his innocence when he did not testify at trial. A conviction for false pretenses in the State of Maryland permits a maximum sentence of ten years, while a conviction for fraudulent misappropriation carries a term from one to five years. In each instance of his eight[5] convictions, the Petitioner received but a two-year sentence, and all sentences were to run concurrently. Under these factors, it is apparent that there was "no inpropriety in the sentencing hearing

[5] As previously noted, four convictions were reversed.

and no demonstration of ill will, passion, prejudice or any unworthy motive" (A. 83).

11. The test in a jury trial in Maryland on a motion for a judgment of acquittal is:

> ". . . whether the admissible evidence adduced at the trial either showed directly, or circumstantially, or supported a rational inference of, the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt, of the appellant's guilt of the offense charged . . ." (A. 77-78).

This was the test used by the trial judge, and the use of this test was not error.

12. Petitioner acknowledges that his contention that the trial judge refused to suppress wrongfully seized evidence has previous been discussed. The Respondent would rely on the previous argument herein to answer the same.

13. Without citing any specific alleged adverse rulings or authority to substantiate the same, the Petitioner merely contends that the trial judge made numerous adverse rulings on evidence. It is submitted that any ruling on evidence against an accused would be adverse, but not necessarily prejudicial. The Respondent would rely upon the opinion of the Court of Special Appeals in answering Petitioner's contention (A. 69-73).

14. Petitioner next contends that the Court of Special Appeals refused to reply to Petitioner's major contentions, "especially as to lack of jurisdiction, and its application of past decisions of the case . . ." (Br. 32). There are no specific contentions, nor is there any authority cited by the Petitioner to support his allega-

tions. It is evident that the court trying the Petitioner had jurisdiction, and assuming that the "past decisions of the case" refer to Clark-King Construction Co., and *Andresen v. Salter, et al.*, 269 Md. 494, 307 A.2d 485 (1973) and *Andresen v. Bar Association of Montgomery County*, 269 Md. 313, 305 A.2d 845 (1973), the opinion of the Court of Special Appeals is replete with references to these two cases.

15. Petitioner also argues that the Court of Appeals failed to state its reason for a denial of certiorari. However, a review of the record (A. 92) reveals that the Court of Appeals denied Petitioner's Writ of Certiorari "as there has been no showing that review by certiorari is desirable and in the public interest."

In concluding, the Petitioner argues that the burden of showing error was harmless beyond a reasonable doubt is upon the prosecutor (Br. 33). However, the Petitioner has failed to show any error in the first instance. In his appeal to the Court of Special Appeals, the Petitioner raised twenty-seven specific issues and then twenty-six additional issues in a similar fashion as the Petitioner has raised these final fifteen contentions. The Court of Special Appeals reasoned: "Twenty-six times nothing is nothing" (A. 88). The Respondent would submit that under Petitioner's total argument that he was denied due process and equal protection of the laws, fifteen times nothing is nothing. Petitioner has a constitutional right to a "fair trial" but not necessarily to that seldom experienced rarity, a perfect trial. *State v. Babb*, 258 Md. 547, 267 A.2d 190 (1970). A review of the record illustrates clearly that the Petitioner received a fair trial, and none of the above allegations of the Petitioner show otherwise.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
GILBERT ROSENTHAL,
Assistant Attorney General
of Maryland,
Counsel for Respondent,
One South Calvert Building,
Calvert and Baltimore Streets,
Baltimore, Maryland 21202.

Supreme Court, U. S.
FILED
NOV 20 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF PETITIONER

PETER C. ANDRESEN
Petitioner
3514 Plyers Mill Road
Kensington, Maryland 20795

ABB DUPLICATORS, INC.—1722 Eye Street, N.W.—Washington, D.C.—298-6837

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	9
ARGUMENT	11
CONCLUSION	37

TABLE OF AUTHORITIES CITED

Cases:

Aguilar v. Texas,
378 U.S. 108 (1964) 11, 35

Bellis v. United States,
417 U.S. 85 (1974) 9, 12, 21

Berger v. New York,
388 U.S. 41 (1967) 30

Boyd v. United States,
116 U.S. 616 (1886) 21, 22, 24, 30

Bumper v. North Carolina,
391 U.S. 543 (1968) 26

Page

Clark-King Const. Co. & Andresen v. Salter,
269 Md. 494 (1973) 33, 36, 37

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 30

Couch v. United States,
409 U.S. 322 (1973) 9, 14, 16, 22, 25

Curcio v. United States,
354 U.S. 118 (1957) 22

Entick v. Carrington,
19 How. St. Tr. 1029 (1765) 23

Gilbert v. California,
384 U.S. 757 (1965) 15

Gouled v. United States,
255 U.S. 298 (1921) 23, 24

Griswald v. Connecticut,
381 U.S. 479 (1965) 23

Hale v. Henkel,
201 U.S. 43 (1906) 21

Hill v. Philpott,
445 F.2d 144 (C.A. 7),
cert. denied, 404 U.S. 991 (1971) . . . . . *passim*

Huber v. State,
2 Md. App. 245 (1967) 34

McEwan v. State,
194 Md. 494 (1950) 34

Page

Polisher v. State,
11 Md. App. 555 (1971) 31

Schmerber v. California,
384 U.S. 757 (1965) 15, 24

Sgro v. United States,
287 U.S. 206 (1932) 30

Stuart v. United States,
416 F.2d 459 (C.A. 5, 1969) 22

United States v. Beck,
511 F.2d 997 (C.A. 6, 1975) 18, 19

United States v. Bennett,
409 F.2d 888 (2nd Cir., 1969) 20

United States v. Blank,
459 F.2d 383 (C.A. 6),
cert. denied, 409 U.S. 887 (1972) 7, 8, 9, 12, 16, 17, 18, 19

United States v. Gargotto,
510 F.2d 409 (6th Cir. 1974) 18, 19

United States v. Lefkowitz,
285 U.S. 452 (1932) 23

United States v. Murray,
492 F.2d 178 (9th Cir., 1973) 20

United States v. Poller,
43 F.2d 911 (2nd Cir. 1930) 19

United States v. Scharfman,
448 F.2d 1352 (2nd Cir. 1971) 20

Page

United States v. Zive,
299 F. Supp. 1273 (S.D.N.Y. 1973) 18, 19

Vonder Ahe v. Howland,
508 F.2d 364 (1975) 9, 17, 21, 25, 29, 30

Warden v. Hayden,
387 U.S. 294 (1967) 6, 10, 23, 24, 33, 34, 35

Weeks v. United States,
232 U.S. 383 (1914) 23

Wilson v. United States,
221 U.S. 361 (1911) 21

Constitutional Provisions:

Constitution of the United States –
Amendment IV 2
Amendment V 2
Amendment XIV 3

Declaration of Rights to the Constitution of Maryland
Article 26 . . . . . 4, 30

Statutes:

Annotated Code of Maryland –
Article 27 – Section 551 . . . . . 3, 31
Article 35 – Section 5(a) 3, 9, 25

United States Code –
Title 28 – Section 1257(3) 2

Reference Works:

Cornelius, *The Law of Search and Seizure* 26

Wigmore, 8J *Evidence* 7

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 24 Md. App. 128, 331 A.2d 78 (1975), and is printed in the Appendix, *infra,* page A-1.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland, which is to be reviewed, was dated January 10, 1975.

(A-1) A timely Motion for Reargument and Modification of Opinion was denied and that Court's Mandate was issued on February 11, 1975. (A. 89, 90)

A timely Petition for Writ of Certiorari to the Court of Special Appeals of Maryland was filed in the Court of Appeals of Maryland, the highest Court of the State, and was denied on March 31, 1975. (A. 92) The time within which to petition for certiorari to this Honorable Court therefore ran from that date.

The Petition for Writ of Certiorari was filed in this Honorable Court on June 28, 1975 and was granted on October 6, 1975.

The jurisdiction of this Court is invoked under *28 U.S.C., Sec. 1257(3).*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States: Amendment IV —
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V —
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of

life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV —

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland:

Article 35, Sec. 5(a) General rule —
No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Article 27, Sec. 551 —
Whenever it be made to appear to any judge . . . by a written application signed and sworn to by the applicant, accompanied by an affidavit or affidavits containing facts within the personal knowledge of the affiant or affiants,

that there is probable cause, the basis of which shall be set forth in said affidavit or affidavits, to believe that any misdemeanor or felony is being committed by an individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge . . . or that any property subject to the seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then such judge . . . may forthwith issue a search warrant directed to any duly constituted policeman . . . authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that any such warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched, the grounds for such search and the name of the applicant on whose written application as aforesaid the warrant was issued.

Declaration of Rights to the Constitution of Maryland:

Article 26 —

* * * and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

QUESTIONS PRESENTED FOR REVIEW

I. May an attorney at law, who is a sole practitioner, invoke his privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction of his personal handwritten notes and memoranda, books, and records, which were seized

from his desk and files in his personal office, under a search warrant held to be otherwise reasonable, into evidence against him at his criminal trial?

II. Was the search of petitioner's offices violative of Amendment IV to the Constitution of the United States?

STATEMENT OF THE CASE

The "inner sanctum" of Petitioner's law offices and files was invaded in October, 1972, by police officers and members of the State's Attorney's staff armed with an alleged warrant to search the premises. The searchers, approximately eight in number, spent the greater part of six hours rummaging through Petitioner's desk and private files. All of the private papers, documents and handwritten notes present and belonging to the Petitioner were scanned, many were examined with detail. Upon completion of the search, the officers carried literally thousands of such testimonial and communicative papers away with them.

On the next day Petitioner was charged by a Bill of Information with four counts of false pretenses, containing virtually the same substance as contained in the application for the search warrant. About two weeks later, after thorough examination of the seized papers by the searchers, Petitioner was indicted on approximately fifty (50) additional counts. The subject matter of all of the estimated fifty-four (54) counts was significantly disclosed by the private papers taken.

The State elected to try Petitioner on the original four counts consolidated with seventeen other counts, forming one of the indictments, for a total of twenty-one (21)

counts. (A. iii) Petitioner filed a motion to suppress the papers seized, (A.129) among others. At the pre-trial hearing thereon, the State elected to present only a small fraction of the papers seized as pertaining to the charges upon which Petitioner was to be tried. These papers still numbered in the hundreds. A great portion of the papers presented at the hearing was suppressed by the trial judge; but a significantly large number were not. This conclusion was reached by the trial court by its application of *Warden v. Hayden*, 387 U.S. 294 (1967) to petitioner's case by stating in its Memorandum Opinion and Order (A.136) that:

> "The Hayden case, however, overruled this distinction and held that the Fourth Amendment of the United States Constitution was not violated by the seizure of 'mere evidence' if there was proven to be a nexus between the items seized and the criminal behavior. This case held that 'mere evidence' may be seized if probable cause can be established that the evidence will aid in the particular apprehension or conviction . . . As to the excepted items, it appears to the Court that the State has conclusively shown a nexus between them and the alleged criminal behavior."

The trial court also rejected all of petitioner's attacks upon the warrant, its reasonableness and the extent of the search, whether authorized by the warrant or not. (A.136) In specifically rejecting petitioner's Fifth Amendment claim that the private papers seized could not be used against him, since they were privileged, the trial court held:

> "The thrust of defendant's argument here is that he has the right of privacy in and over his person, house, papers and effects, on the ground that to permit these items to be introduced into evidence would be prohibition against compulsory self-incrimination.
>
> "On this point there seems to be no Maryland law, and in two cases before the Federal system, the Courts took opposite views and in both cases certiorari was denied by the United States Supreme Court.
>
> "In *United States v. Blank*, 495 Fed.2d 383 [Sixth Circuit, 1972], the United States Court made a distinction between those records sought by subpoena and records sought by search warrant. They held that there was a valid and important distinction. The subpoena compels the person receiving it by his own response to identify the document and deliver as the one described in the subpoena; the search warrant involves no such element of compulsion upon an actual or potential defendant. In the *Hill v. Philpott* case, 445 Fed. 2d 145, Second Circuit (sic), the Court held that the subpoena-search warrant distinction was 'more shadow than substance,' and held that the seizure of personal papers of the defendant was in violation of the Fifth Amendment. The Blank case in effect rejected the holdings in the Philpott case, and seems to this Court to be the better law. 8J, Wigmore, *Evidence*, Sec. 2264 [McNaughton, Rev., 1961]. It is conceded in this case that

> evidence produced by the defendant in response to a subpoena *duces tecum* would be in violation of the Fifth Amendment, but it is argued that evidence received as a result of the search warrant compels the defendant to do nothing. Relying on the Blank case and Wigmore on *Evidence*, this Court holds that the seizure of the excepted items by search warrant does not violate the Fifth Amendment to the United States Constitution."

Those papers remaining unsuppressed were introduced into evidence, over objection, at Petitioner's trial (Ex. A. 173-177) and were significantly important in leading to his conviction, as is evidenced by the Opinion of the Court of Special Appeals of Maryland. (A. 19, 24, 25)

The Court of Special Appeals, in upholding the decisions of the trial judge as to petitioner's Fourth and Fifth Amendment challenges, also identically rejected the holding of *Hill v. Philpott*, 445 F.2d 144 (C.A. 7), cert. denied, 404 U.S. 991 (1971), and adopted the holding of *Blank v. United States*, 459 F.2d 383 (C.A. 6), cert. denied, 409 U.S. 887 (1972) as controlling, just as the trial judge had done. (A. 28-54)

Following the trial, during which the tainted seized evidence was used against him, Petitioner was convicted by the jury of all of the eight counts not abandoned by the prosecution. The Court of Special Appeals then reversed four of the counts. This leaves the Petitioner presently convicted of the four counts which are to be reviewed by this Honorable Court.

SUMMARY OF ARGUMENT

I

Petitioner argues as to Question I that the Fifth Amendment prohibition against compulsory self-incrimination applies as well to personal business papers seized from his offices as it does to the same papers being required to be produced under a subpoena. In this case, Respondent, and the lower courts, concede that the Fifth Amendment would have applied to the papers in question had they been sought by subpoena. They, however, conclude that, because the papers were seized under a warrant held to be otherwise reasonable, they are not protected because petitioner "was not compelled to do anything." (A. 51-4)

In essence, the lower courts opted to adopt the reasoning of *United States v. Blank*, 459 F.2d 383 (C.A. 6), cert. denied, 409 U.S. 887 (1972) as controlling, whereas petitioner argues that the better reasoning, as shown by the past decisions of this Court, is that of *Hill v. Philpott*, 445 F.2d 144 (C.A. 7), cert. denied, 404 U.S. 991 (1971), which holds contra to the *Blank* case.

To underline his contentions, petitioner points to the reasoning of the recent cases of *Vonder Ahe v. Howland*, 508 F.2d 364 (1975), *Bellis v. United States*, 417 U.S. 85 (1974) and *Couch v. United States*, 409 U.S. 322 (1973). He also relies on Art. 35, Sec. 5(a), *Annotated Code of Maryland*.

II

As to Question II, petitioner argues that the search of his offices was violative of the Fourth Amendment for

several reasons, any one of which would require the exclusionary rule to be invoked:

A. The search warrants were never formally introduced into evidence against the petitioner. Petitioner argues that this was a necessary element of proof that could not be dispensed with as was opined by the lower Courts.

B. Because of the descriptive terminology of the things to be seized used in the search warrants (A. 94-118), they became prohibited "general" warrants not "particularly describing the . . . things to be seized". It is argued that already general warrants were made even less particular by the addition, at the end of the descriptive phrase, of the following terminology:

> "together with other fruits, instrumentalities and evidence of crime at this time unknown."

C. Under the circumstances, it was impossible for the judge who issued that warrants to have made the finding, which he did, that probable cause was demonstrated that a crime "is being committed" on the premises to be searched. Not only did the nature of the crime relied on preclude this, but the affidavits in support of the applications recited hearsay facts, the nature of which was abundantly stale, disputed and argumentative.

D. The principals and purposes of *Warden v. Hayden*, 387 U.S. 294 (1967), as to the admission of the seized papers, were violated by the lower Courts. It is petitioner's argument that the cited case, in its own words, requires a "consideration of police purposes". It is contended that an examination of these purposes reveals that the search and seizure was unreasonable.

E. The two-prong test of credibility-reliability and trustworthiness of the non-swearing informants was not satisfied. The test is required by *Aguilar v. Texas*, 378 U.S. 108 (1964). In petitioner's case, the affidavits were based, not on personal observations, but solely on hearsay evidence. As is shown by the content of the affidavits and the testimony of the affiants, not only were there no facts set out to substantiate the credibility of the informants and the reliability of the information, but that the informants were not disinterested and the facts alleged were the subject of a heated civil controversy upon which petitioner ultimately prevailed, of which the affiants had full knowledge and failed to reveal to the issuing judge and they were in fact false.

ARGUMENT

I

AN ATTORNEY AT LAW, WHO IS A SOLE PRACTITIONER, MAY INVOKE HIS PRIVILEGE AGAINST SELF INCRIMINATION UNDER AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES, TO PREVENT THE INTRODUCTION OF HIS PERSONAL HANDWRITTEN NOTES AND MEMORANDA, BOOKS AND RECORDS, WHICH WERE SEIZED FROM HIS DESK AND FILES IN HIS PERSONAL OFFICE, UNDER A SEARCH WARRANT HELD TO BE OTHERWISE REASONABLE, INTO EVIDENCE AGAINST HIM AT HIS CRIMINAL TRIAL.

As to this premise, review has apparently been granted because:

1. The state court has decided an important federal constitutional question which has not heretofore been determined by this Court; and has decided it in a way probably not in accord with applicable decisions of this Court

on the same subject, but not precisely on the same point; and, in so doing has adopted the holding of a federal court of appeals wherein:

2. A court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; and has decided an important federal constitutional question which has not been, but should be, settled by this Court; and has decided it in a way in conflict with applicable decisions of this Court on the same subject, but not precisely on the same point.

The above premise is true because the state courts have adopted, as being correct, the reasoning of *United States v. Blank, supra,* as stated in the Statement of the Case herein, in holding that the Fifth Amendment privilege does not attach to personal records simply because they were seized under a valid search warrant, because:

> "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena compels the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant."

In so doing, the state courts have openly and directly rejected the holding of *Hill v. Philpott, supra,* (another United States Court of Appeals case recently cited with unanimous approval of this Court in *Bellis v. United States,* 417 U.S. 85, 87-8 (1974)). *United States v. Blank* and *Hill v. Philpott* are in direct conflict as to the reasoning used in the premise decided in petitioner's cause.

Hill v. Philpott held that personal business records seized by an Internal Revenue agent could not be used without violation of the defendant's Fifth Amendment rights.

It is important to note that the State of Maryland does not contend, nor did the state courts take issue with the fact that the papers seized and admitted into evidence over objection in petitioner's case were personal papers of the type which would ordinarily be privileged and could not be used against him. Both the respondent and the state courts readily admit that, if the subject documents had been sought by subpoena, rather than seized, they would have been privileged. (A. 51, 142). They, however, each conclude that, because the search and seizure of the papers was held to be reasonable, the Fifth Amendment protections therefore do not apply because petitioner "was not compelled to do anything". (A. 51-4)

However, in its Brief in Opposition to the Petition for Writ of Certiorari, Respondent belatedly sought to argue the characterization of the papers. This argument should fail for three reasons:

1. It should be underscored that this argument comes too late. Respondent conceded the nature of the papers below when it admitted that they would have been protected had they been sought by subpoena rather than search warrant. Evidence of this concession at both the trial level and appellate level appears in the appendix as follows:

a. At the trial level, quoting from the Trial Judge's opinion on the seized evidence in this case, the Court said (at A. 142):

> "It is conceded in this case that evidence produced by the defendant in response to a subpoena *duces tecum* would be in violation of the Fifth Amendment, but it is argued that evidence received as a result of the search warrant compels the defendant to do nothing."

b. At the appellate level, quoting from the Opinion of the Court of Special Appeals, the Court said (at A. 51):

> "The State's position, on the other hand, is that is proceeded exclusively on a Fourth Amendment basis, whereunder probable cause will justify a court's warrant to search for and to seize incriminating evidence, and not upon a Fifth Amendment basis, whereunder a suspect is required by subpoena to present for examination his records which *may* be incriminating."

2. Respondent somehow reasons that if the subject papers reflect business thoughts that they are no longer personal thoughts. The Constitution does not differentiate between business and family thoughts. The important things are:

a. The subject papers were clearly in the possession, not to mention the ownership, of the petitioner at the time of their seizure and "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment". *Couch v. United States,* 409 U.S. 322, 327 (1973).

b. The numerous seized notes, memorandums, estimates, abstracts, letters of correspondence and other papers

in question, many of the most incriminating of which were shown to be in the handwriting of the petitioner, are the kind of "communicative act or writing" that would reflect the author's personal thoughts, opinions and conclusions. *Schmerber v. California,* 384 U.S. 757 (1965). See also, *Gilbert v. California,* 388 U.S. 266-67 (1967) which held that the taking of handwriting exemplars is a form of compulsion within the meaning of the Fifth Amendment, but that, "A mere handwriting exemplar, *in contrast to the content of what is written,* like the voice or body itself, is an identifying physical characteristic outside of its protection" because it is not the kind of "communication" covered by the privilege. (Emphasis added.)

3. Many, if not most, of the seized papers introduced, over objection, at petitioner's trial were shown to be in the personal handwriting of the petitioner. All of them were owned and maintained by him in his office desk and files. These papers were significantly important in leading to his conviction as is evidenced by the Opinion of the Court of Special Appeals. Among these papers were:

a. "(H)is preparation of settlement sheets in his own handwriting". (A. 19) These were work sheets and estimates prepared by petitioner and changed, amended and scratched out many times prior to the actual typewritten (or final) sheet used at settlement.

b. "A small memorandum — type note — analyzed to be in the handwriting of the appellant — ". (A. 24) This was the original of a memorandum written by petitioner and maintained in his own file.

c. "The contract, in the appellant's handwriting". (A. 25) This was the original copy prepared by petitioner and maintained in his own file.

d. "(A) folder . . . which contained title rundowns, work sheets, deeds of easement, declarations of covenants, abstract reports, deeds of trust and title binders . . . with additional notations . . . a grantor list . . . a handwritten page from a legal pad", etc. (A. 46 - 7) These items were the file copies of various papers in "scratch" and initial form, many handwritten. Some of them were later typed in final form. Some of them had personal notations thereon. All were maintained by petitioner in his own files.

e. See, also excerpts from the transcript of testimony at pages A. 150-151, 159-161, 162, 163, etc.

Petitioner, initially must state that he does not agree with the reasoning of *Blank* that there is no element of compulsion present when a defendant's personal papers are seized. In petitioner's view, as well as the view of this Court he believes, there is a greater degree of compulsion exhibited by a forced taking of one's personal papers during a search and seizure than by directing production of those documents by use of a subpoena.

Such a holding is a complete divorce from the true meaning of compulsion or being compelled. Recently, in his concurring opinion in *Couch v. United States,* 409 U.S. 322 (1973), Mr. Justice Brennan observed:

> If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain

> the documents without requiring the owner to take them in hand and personally present them to the Government agents. Where the Government takes private records from, for example, a safety depcsit box against the will of the owner of the documents, the owner has been compelled, in my view to incriminate himself within the meaning of the Fifth Amendment.

Furthermore, the reasoning of *Blank,* relied on so strongly by the State courts, was somewhat "watered down" by its additional holdings in that instance that the papers seized "were not communicative in nature", were not "personal and private writings", and were "on their face instrumentalities" of a crime. This is the probable reason why certiorari was denied in that case by this Honorable Court. Such is concededly not true of petitioner's case!

Also, after initially fully adopting the views of *Hill v. Philpott,* the Court of Appeals in *Vonder Ahe v. Howland, supra,* over the strong dissent of Judge Ely, who had written the initial opinion, sidestepped the issue without rejecting either *Hill* or *Blank* when they remanded the issue for determination at the trial level, if and when proceedings were ever brought against the Appellant, by adopting the language from *Blank* that:

> Here, in fact, we have no way of knowing that the instant records are connected with the defendant beyond his counsel's statement in the motion to suppress that they "may be" in his handwriting. This, however, is an important fact upon which the government must at trial bear the burden of proof and upon

> which, for all we know, there may be strong dispute.

Such, importantly is not true of petitioner's case. Not only were many of the records seized in the instant case shown to be in petitioner's handwriting, but it is obvious that the balance of them were prepared by his amanuensis. It is also significant that the issue was again raised by the petitioner at the trial level when the State offered the seized papers into evidence. (Ex. A. 173-177)

Respondent, in its Brief in Opposition to the Petition for Writ of Certiorari, also argued in favor of the *Blank* reasoning. In petitioner's view, Respondent's argument and case citations tend to magnify and more fully illustrate that the reasoning of *Hill v. Philpott, supra,* is the better rule; and is the one which should be adopted by this Honorable Court. See, for instance, page 8 of Respondent's brief, where, quoting from *United States v. Beck,* 511 F. 2d 997 (C.A. 6, 1975), it was said:

> "*United States v. Gargotto,* 510 F.2d 409 (6th Cir. 1974), sustained the reasonableness of a search involving much greater 'rummaging'. Cf. *Philpott, supra* (more than thirty cartons of records seized); *United States v. Zive,* 299 F. Supp. 1273 (S.D.N.Y. 1973) (at least seven desk or file drawers.)"
>
> [Footnote 4: Testimony in the instant case revealed a seizure of less than 5% of Petitioner's files.]

Gargotto involved a seizure during a fire emergency without a warrant. No Fifth Amendment contention was raised. It was held that there was no need for a search warrant due to exigent circumstances. In the *Zive* case, The Court described the search of at least seven desk or file drawers as:

> What was done here seems precisely what Judge Learned Hand described as "rummaging about among his effects to secure evidence against him". *United States v. Poller,* 43 F.2d 911, 914 (2nd Cir. 1930).

In petitioner's case, the "5% seized" amounted to literally thousands of papers which later filled several file cabinet drawers in the office of the States Attorney. (See Returns at A. 119, 122, which each folder contained approximately 50 to 100 and sometimes over 200 pages). Every wer drawer in petitioner's desk, and each and every adjoining desk, every file in every bookcase and credenza and each of over twenty file cabinet drawers were searched. Most important was the scope of the search wherein virtually *every one* of the thousands of papers present therein were scanned and most were examined with detail. The searchers, approximately eight in number, spent the better part of six hours conducting the search.

Each of the cases cited by respondent which appear to be favorable to its cause are distinguishable from the instant case (and *Hill v. Philpott*) upon a closer examination of the facts, involved (as was also true of the *Blank* case):

1. *United States v. Beck,* 511 F.2d 997 (6th Cir., 1975) involved a warrantless automobile search under exigent circumstances. The police looked only at the

first page of the seized notebook in the absence of the appellant. The appellant was unaware of the search and offered no resistance, and therefore the Court felt that there was no "compelled cooperation". As to the reasonableness of the search, the Court reasoned that "the vice lies in the unlimited search" and distinguished between the one page of the notebook seized and a greater "rummaging".

2. *United States v. Scharfman*, 448 F.2d 1352 (2nd Cir., 1971), cert. denied 405 U.S. 919 (1972) involved the seizure of a listing of fur shipments incident to a warranted search for stolen furs.

3. *United States v. Murray*, 492 F.2d 178 (9th Cir., 1973) involved a seizure of an address book in addition to 10.8 pounds of heroin and resulted from a search incident to a lawful arrest. *Murray*, as well as *Beck* relied on *United States v. Bennett*, 409 F.2d 888 (2nd Cir., 1969) wherein a letter was seized, not from the appellants, but from the girl friend of one of them during a lawful search of her pocketbook for narcotics.

4. In *Marron v. United States*, 275 U.S. 192 (1927), the Court reasoned that the utility bills were seized incident to a lawful arrest. (There was no arrest of petitioner at the time of the seizure in the instant case.)

Concluding, it must be said that the substantive merit of the approach of the *Blank* case should not be accepted. "One need ask only what would happen if the addressee of a warrant refused to allow the search to be conducted to appreciate the magnitude of compulsion produced by a search warrant. Without the slightest hesitation his doors would be borken down, he would be placed under arrest,

and the desired material would be seized. How the imminence of such force can be considered as anything other than compulsion escapes" petitioner. *Vonder Ahe v. Howland, supra.* (Concurring and Dissenting Opinion.)

As it was said in *Hill v. Philpott, supra:*

> "The jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice."

See also, *Hale v. Henkel*, 201 U.S. 43, 76 (1906) wherein this Honorable Court said:

> ". . . the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum* against which the person, . . . is entitled to protection"

Finally, it is submitted that the applicable previous decisions of this Court indicate that the holding of the *Blank* court and the state courts in this cause must be rejected and that of the *Hill v. Philpott* court upheld.

As recently as in *Bellis v. United States, supra*, Mr. Justice Marshall proclaimed for this Court that:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd v. United States*, 116 U.S. 616 (1886), we held that "any forcible

and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635; *Wilson v. United States*, 221 U.S. 361, 377 (1911). The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd v. United States, supra; Couch v. United States*, 409 U.S. 322 (1973); *Hill v. Philpott*, 445 F.2d 144 (CA7), cert. denied, 404 U.S. 991 (1971); *Stuart v. United States*, 416 F.2d 459, 462 (CA5 1969). As the Court expiained in *United States v. White, supra*, at 698, "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." See also *Curcio v. United States*, 354 U.S. 118, 125 (1957); *Couch v. United States, supra*, at 330-331 . . . . We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought" — an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication — and "proscribes state intrusion to extract self-condemnation," *Couch v. United States,*

supra, at 327. See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

The above dissertation reflects the teaching of the great English case of *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), which were cherished by our statesmen when the Constitution was adopted. These teachings were first enunciated in *Boyd, supra*, then in *Gouled v. United States*, 255 U.S. 298 (1921), and again in *United States v. Lefkowitz*, 285 U.S. 452 (1932) wherein it was said that in *Entik v. Carrington:*

> Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help federal conviction even in cases of most atrocious crime . . .

In *Weeks v. United States*, 232 U.S. 383 (1914), it had been said:

> . . . as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, . . . is entitled to protection."

In *Warden v. Hayden*, 387 U.S. 294 (1967), the landmark case for seizure of "mere evidence" as opposed to fruits of crime, etc., which the state courts in petitioner's case reason as overruling *Gouled* as to the above cited protection as to private papers, dealt with articles of clothing, and in fact expressly eliminated personal papers from its holding, when the Court said at page 302-3:

> The items of clothing involved in this case are not "testimonial" or "communicative" in nature and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

The principles of *Boyd* were therefore not overruled by *Warden v. Hayden*, but in fact upheld!

Thus, when the *Hill v. Philpott* Court stated:

> The *Warden* decision thus eliminates any distinction as between items which may be considered "mere evidence" and those which may be "instrumentalies, fruits of crime, or contraband." In overruling *Gouled* as to its Fourth Amendment teachings, we do not believe that the Court intended to in any way diminish the Fifth Amendment characteristics which might attach to certain items of property such as personal books and records. Indeed, the Fifth Amendment holding of *Gouled* which concluded that the documents there at issue were protected appears still to be applicable, as that aspect of the case was not mentioned in the *Warden* opinion . . .
>
> Significantly, the *Warden* Court immediately distinguished the nature of the evidence seized in the case from the books and papers involved in both *Boyd* and *Gouled*.

— they were professing the status of the law of the land in this regard, which remains so.

It is important enough to mention again that the subject records were *clearly in the possession*, not to mention the ownership, of the petitioner at the time of their seizure and "possession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment." *Couch, supra*, at 331. Thus, these records were protected from seizure by the Fifth Amendment. *Vonder Ahe, supra.*

Additionally, Article 35, Section 5(a), *Annotated Code of Maryland*, also precluded the admission of the evidence seized under the search warrant in petitioner's trial for false pretenses, a misdemeanor.

Art. 35, Sec. 5, since repealed, was in full force and effect at the time of the search and seizure and at the time of Petitioner's trial. Subsection (a) thereof provides:

> No evidence in the trial of misdemeanors shall . . . be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Since the effect of the admission of the seized evidence was to compel Petitioner "to give evidence against himself" and since the statute prohibited the admission of same in no uncertain terms, his convictions should have been reversed by the Court of Special Appeals.

This premise was pointed out to the Court in Petitioner's appeal brief, argued before the Court and brought up again on motion for reargument, all to no avail since the

Court of Special Appeals refused comment on it. In ignoring the cited statute the Court of Special Appeals has denied Petitioner his constitutional rights.

II

THE SEARCH OF PETITIONER'S OFFICES WAS VIOLATIVE OF AMENDMENT IV TO THE CONSTITUTION OF THE UNITED STATES.

A. The search warrants were never formally introduced into evidence.

In *Bumper v. North Carolina*, 391 U.S. 543 (1968), this Court made the observation that if the State relied upon a search warrant to justify a search, but failed to produce it in evidence, "there is no way of knowing the conditions under which it was issued, or determining whether it was based upon probable cause" (footnote 15 at page 550). In Cornelius, *The Law of Search and Seizure*, 185, "Duty of prosecution to introduce search warrant, in evidence," (1926), it is stated:

> "A conviction cannot be sustained where a search warrant, under which the evidence has been obtained, is not introduced in evidence, where it appears from the evidence that the discovery and seizure * * * was attempted to be justified by the officer's possession of a search warrant the validity of which, though objected to and attacked, was not established by the introduction of the warrant itself, or by proof of its contents."

In its brief in opposition to the petition for certiorari respondent does not take issue with petitioner's authorities.

Since the Opinion of the Court of Special Appeals of Maryland clearly shows that the warrants were never formally introduced into evidence (A. 31), where it said:

> Although the magic words, "we hereby formally introduce the search warrants as exhibits," may not literally have been uttered, . . .,

Respondent's position that they were apparently introduced is refuted.

Admittedly, the warrants and applications were present at the suppression hearing, discussed and passed around; but the State failed to have them introduced or admitted into evidence. The Court of Special Appeals felt that because the warrants were forwarded by Court order to the Circuit Court for Frederick County "for the purpose of their introduction into the records" and the fact that they were physically present at the hearing and that the trial judge "admonished the State not to have witnesses read from the warrant because 'the warrant speaks for itself' ", their non-introduction and lack of admission into evidence was overcome. (A. 28-33)

The introduction and admission into evidence of warrants is a formality that cannot be dispensed with. To hold otherwise would dispense with the necessity to introduce *any* document into evidence where its existence and contents are intended to be proved or that in the alternative a proper foundation be established for the use of secondary evidence. Neither was done here.

B. Because of the descriptive terminology of the things to be seized used in the warrants, they became prohibited "general" warrants not "particularly describing the . . . things to be seized".

The terminology of the warrants in terms of describing the things to be seized is set out in full at page A. 38 of the Opinion of the Court of Special Appeals in the case sought to be reviewed. The Court felt that the warrants were "models of particularity." This is true, *up to a point.* When the language of the warrants left that point of demarcation of particularity, they became general warrants.

Initially, and throughout the lengthy descriptive phrase of the particular things to be seized, the warrant lists, in minute detail, every conceivable piece of writing and tangible evidence possible "showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses" "pertaining to sale, purchase, settlement and conveyance of Lot 13, Block T . . ." The list of papers and records sought in general terms could not possibly be more complete!

But then the prosecutor struck the fatal blow! He showed the true intent of the warrant and its description of things to be seized when he added the following phrase, which negated all of the previously set out general particularity:

> "together with other fruits, instrumentalities and evidence of crime at this time unknown."

The addition of this phrase had the same effect as amending a bill in the Legislature which prohibits sex discrimination by adding a phrase that it "does not apply to women".

The phrase completely reverses and negates the meaning of the language and thereby authorized a prohibited "general rummage through all the materials".

This was not a "minor imprecision in draftsmanship", but a carefully conceived plan to search and seize hordes of material not pertaining in any way to Lot 13, Block T, which plan was in fact carried to fruition and upheld by the Court of Special Appeals.

The Court's Opinion holds that: "We read the questioned phrase as referring to 'other fruits, instrumentalities and evidence' of the crime of false pretenses with respect to Lot 13T." (A. 38) This holding is simply not reasonable. The addition of the phrase extended the warrant to include *any* evidence of *any* crime (not particular evidence of a particular crime) and therefore made the warrants "general". If the phrase referred to Lot 13T, why didn't it say so? Why was it added when the particularity as to 13T was so complete? Why did it allow seizure of evidence "of *crime at this time unknown*"?

The subject officers, approximately eight in number armed with the illegal general authority of the subject warrants, spent about six hours apiece in a general rummage through both premises and went away with boxes full of papers. No large articles, just papers. As a matter of fact, they did not even know what papers they had, for the most part, until they have a chance to go through all the material at a later date. (A. 148-151, 151-153, 153-154).

Additionally it must be said that even the "model particularity" of the warrants was "general" in terms of the unanimous holding in *Vonder Ahe v. Howland, supra.*

Compare the descriptive terms of the warrant in *Vonder Ahe* with those of the instant case and you cannot help but notice the similarity. In *Vonder Ahe*, the warrant was struck down as being "general" and thereby lacking probable cause for its issuance when the Court cited *Berger v. New York*, 388 U.S. 41 (1967):

> The proceeding by search warrant is a drastic one *Sgro v. United States*, 287 U.S. 206 (1932) and must be carefully circumscribed so as to prevent unauthorized invasions of 'the sanctity of a man's home and privacies of life.'" *Boyd v. United States, supra.*

and from *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) when it said:

> The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is tne 'general warrant' abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. (citation ommitted). The warrant accomplishes the second objective by requiring a "particular description" of the things to be seized.

and concluded:

> . . . it is difficult to believe that the draftsmen of the 4th Amendment did not insert "unreasonable" to avoid just such an *in terrorem* state as the Agents created and wreaked here.

Also, Article 26, *Declaration of Rights to the Constitution of Maryland* prohibits such "general warrants".

C. Because of the nature of the crime of false pretenses, it was impossible for the judge who issued the warrants to have made the finding, which he did, that probable cause was demonstrated that a crime "is being committed" on the premises.

The search warrants were issued on October 30, 1972, based on contemporaneous affidavits. The very nature of the crime of false pretenses, which was allegedly established in the affidavits as having been committed in July, 1972, is that there was "a false representation of a past or existing fact". *Polisher v. State*, 11 Md. App. 555 (1971). Therefore the issuing judge could hardly have found that a crime was currently "being committed" over three months later, which he did. The Court of Special Appeals, relying on Art. 27, Sec. 551, *Annotated Code of Maryland*, wherein it is stated that a search warrant may be issued upon a finding that probable cause exists that "any property subject to seizure under the criminal laws of this state is situated" on the premises, made the warrant acceptable. The Court then goes on to read the *Fourth Amendment* as part of the "Criminal laws of this State". (A. 37) Even if so, this finding completely ignores the fact that the affidavit in support of the warrant alleged, and the issuing judge found by incorporating the affidavit into the warrant, "that there is probable cause to believe that the laws relating to false pretenses . . . are being violated upon the . . . premises." This was an impossibility.

Also, it is incumbent upon the issuing Judge to have "fresh facts" in order to form a reasonable belief that probable cause exists that the goods or instrumentalities

are still present on the premises upon which they were allegedly observed. In order to reach a reasonable conclusion of probability, the time of the observation and relative "staleness" of the same and the information must be a major consideration. In the instant case, especially at the 3700 Decatur address the information and only pretense of an observation was approximately *three and one-half months old.* These certainly were not fresh enough facts to lead to a reasonable conclusion that the articles were still there. Probable cause was therefore lacking in this respect.

Petitioner produced evidence at the hearing on the motion to suppress and persistently raised the issue that the information contained in the affidavit as to the existence of the alleged liens at the time of the affidavit was false and erroneous. (A. 167-168) Petitioner also continuously contended that, assuming arguendo that the State's proposition that false pretenses was a continuing type crime in this instance, the continuation of the crime had ended on September 13, 1972, when the liens had been paid. This was true even by the State's version where the affidavit stated that one of the two alleged liens was paid and released at the time of the affidavit and the testimony of the affiant (A. 144-147) showed that the other alleged lienor received payment about that same time to be applied to extinguish the alleged lien and that there was some "litigation" . . . "which I didn't get involved in." In other words, it was known, or should have been strongly suspected by the State that, over forty-five days before the affidavit was made, the liens complained of had been extinguished. This rendered the affidavit out of date and "stale" so that it could not produce probable cause.

In addition, the alleged affidavits of police detectives Moyer and Lawrence required these detectives, the only affiants, to draw *legal conclusions* upon which the premise of probable cause was based. This they were not competent or authorized to do. Said legal conclusions, the most important of which was concluding that the Madison note was not paid, are not enough and were in fact erroneous as was later shown in *Clark-King Constr. Co. and Andresen v. Salter,* 269 Md. 494 (1973).

D. The Court of Special Appeals in upholding the admission of certain items into evidence which were obtained by search and seizure violated the principals and purposes annunciated by this Court in *Warden v. Hayden,* 387 U.S. 294 (1967).

The Court of Special Appeals, in the case sought to be reviewed, first, as above stated, held that the subject warrants particularly described the things to be seized as "referring to 'other . . . evidence' of the crime of false pretenses with respect to Lot 13T". (A. 34-5) Then the Court goes on to hold:

> Several other items seized, although not relating to Lot 13T specifically, showed a general pattern of operation on the part of the appellant with respect to unreleased deeds of trust on other properties in Potomac Woods and, therefore, negated any suggestion of mere mistake and lack of knowledge on his part when it came to his false representations as to Lot 13T. Because of their bearing on the critical question of their *mens rea,* we hold that they too were seizable evidence under the warrants. (A. 47).

What this holding does is to ignore the standard set forth in *Warden v. Hayden, supra,* that:

> Thus in the case of 'mere evidence', probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. *In so doing, consideration of police purposes will be required.* (Emphasis supplied)

In the instant case, the papers "not relating to Lot 13T" which were seized, were not used by the prosecutor in an attempt to establish *mens rea* as to false pretenses. Instead the prosecutor, after examining the documents for over two weeks, obtained the misappropriation indictments based upon them.

In so doing, and consolidating the false pretense counts with the misappropriation counts for trial, he made the documents relevant in violation of the principles stated in *Huber v. State,* 2 Md. App. 245 (1967). Had it not been for the additional indictments and the consolidation, the additional papers could never have been admitted because they were irrelevant to the false pretense charges. This is clear, because the lower court, despite repeated attempts by the prosecutor throughout the entire trial to introduce other seized evidence of other acts by the petitioner in his attempt to establish *mens rea,* refused its admission. The court properly refused because as the court ruled, the evidence as to the prior acts was clearly inadmissible under the principles of *McEwan v. State,* 194 Md. 494 (1950), due to the fact that the State *never* established a *prima facie* case of guilt in the estimation of the trial judge.

Also, the majority of the papers introduced in the instant case were anywhere from 10 months to 6 years old (A. 155, 156-159, 161, etc.) and so out of date that they could not be connected to an incident 3-1/2 months before. The Court, therefore, was in error in not suppressing them.

Therefore, an examination of the prosecutor's motives, as dictated by this Court in *Warden v. Hayden* reveals that the evidence seized as to the misappropriation counts would also have been inadmissible had it not been for the additional indictments. It should also be noted that these papers were among thousands of others seized. This Court's consideration of the prosecutor's motives should result in a determination of lack of probable cause for the seizure of the papers.

E. The two-prong test of credibility – reliability and trustworthiness of the non-swearing informants was not satisfied.

There were no allegations of direct observation or personal knowledge as to the things sought in the alleged affidavits in support of the search warrants as to whether or not they were present on the premises. Therefore the issuing Judge was forced to rely entirely on information received second, third or fourth hand as hearsay in his determination of probable cause in the warrants. Therefore it was necessary to present reasons why the information received was reliable in order for the magistrate to determine the truthfulness of the information. This is necessary in order to satisfy the two-prong test of credibility-reliability and trustworthiness as enunciated in *Aguilar v. Texas,* 378 U.S. 108 (1964).

The information received in the instant case was not received from "disinterested witnesses", "disinterested civilian sources" or "victims of crime" as opined by the Court of Special Appeals. (A. 43-4) If Young was to be considered as such, it must be noted that the information supplied by him supported no factual basis for the commission of a crime. His information, if in fact he felt something was wrong, was at least fifth or sixth hand. The only possible information that could have led to a belief that a crime had been committed originated with Hecht and by a stretch of the imagination from State National Bank. Hecht (and for that matter Covert of State National) were not disinterested witnesses or victims, they were actually deeply embroiled in a civil controversy with appellant of which the affiants had actual knowledge (A. 144-147). Hecht had admitted to the officers that he had received payments designated for the particular lot subject to the alleged affidavit but was *going to apply them to another debt.* The officers knew that this information should have been presented to the Magistrate in order for him to determine if there was probable cause that a crime had been committed. The officers also knew that there had been a dispute with State National Bank, as well, as to application of payments which had been fully settled by a general release of several lots over forty-five days prior to the affidavit as was borne out by the Covert testimony at the trial. (R. 784-808) The fact that Hecht's information was false and erroneous was borne out as well, not at the trial, but by the decision of the Court of Appeals of Maryland in the *Clark-King* case, *supra.* These facts were not set out as was necessary for the Magistrate to determine the credibility and reliability of the informants on the trustworthiness of their information as is required.

There must be facts set out in the affidavit to show the credibility of the informant and the reliability of his information. This necessary rule was not followed in the instant case. There were no such statements of facts set forth whatsoever.

Also, the information, particularly that given by Norman Hecht, that the Madison note was not paid, was later proven to be false and erroneous in the *Clark-King Constr. v. Salter* case, *supra* in which the Court found that the identical *Madison note had been fully paid.* This evidences the unreliability of the information furnished by Hecht and others. This is also true of State National Bank as was later shown at the trial. (R. 784-808)

For these reasons, the warrant should have failed.

CONCLUSION

For the foregoing reasons, especially as to the Fifth Amendment contentions, the counts upon which petitioner remains convicted should be reversed and the cause remanded for proper disposition by the Courts of Maryland.

Respectfully submitted,

PETER C. ANDRESEN
3514 Plyers Mill Road
Kensington, Md. 20795

Petitioner

Supreme Court, U. S.
FILED
DEC 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF AND APPENDIX OF RESPONDENT

FRANCIS B. BURCH,
Attorney General
of Maryland,
JON F. OSTER,
Deputy Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
GILBERT ROSENTHAL,
Assistant Attorney General
of Maryland,
One South Calvert Building,
Baltimore, Maryland 21202.
For Respondent.

The Daily Record Co., Baltimore, Md. 21202

INDEX

	PAGE
PRELIMINARY COMMENT	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. The introduction into evidence of the handwritten notes and memoranda, books and records of an attorney at law which were seized from the desk and files of the office of the attorney under a search warrant held to be otherwise reasonable, does not offend the privilege against self-incrimination under Amendment V to the Constitution of the United States under the facts and circumstances of the instant case	6
II. The search of petitioner's offices was not violative of Amendment IV to the Constitution of the United States	25
(A) Search warrants were introduced into evidence	25
(B) The warrants in the instant case did not amount to "general" warrants	25
(C) It was not impossible for the trial judge who issued the warrants to have made the finding that probable cause was demonstrated that a crime was being committed on the premises	28

PAGE

(D) The principals and prefaces annunciated by this Court in Warden v. Hayden, were not violated by the Court of Special Appeals in upholding the admission of certain items into evidence which were obtained by the search and seizure in question 30

(E) The two-pronged test of credibility-liability and trustworthiness of the non-swearing informants was satisfied 32

CONCLUSION 35

APPENDIX ..... A. 179

TABLE OF CITATIONS

Cases

Andresen v. Bar Association of Montgomery County, 269 Md. 313, 305 A.2d 845 (1973) .. 16

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1974) 6, 32

Bellis v. United States, 417 U.S. 85, 94 S. Ct. 2179 (1974) 16, 17

Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886) ..... *passim*

Couch v. United States, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973) 13, 21

Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921) 23

Hale v. Henkle, 201 U.S. 43, 26 S. Ct. 370 (1906) 22

PAGE

Hill v. Philpott, 445 F.2d 144 (7th Cir., 1971), cert. den. 404 U.S. 991 (1971) ..... *passim*

Marron v. United States, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927) 14, 15, 27

Nye & Nissen et al. v. United States, 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919 (1949) 31

Polisher v. State, 11 Md. App. 555, 276 A.2d 102 (1972) 31

Shaffer v. Wilson, 523 F.2d 175 (10th Cir., 1975) 10, 11

Stanford v. State of Texas, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965) 27

Taylor v. State of Minnesota, 466 F.2d 1119 (8th Cir., 1972), cert. den. 410 U.S. 956, 93 S. Ct. 1425, 35 L. Ed. 2d 689 (1973) 10, 13

United States v. Beck, 511 F.2d 997 (6th Cir., 1975) 7

United States v. Blank, 459 F.2d 383 (6th Cir., 1972), cert. den. 409 U.S. 887, 93 S. Ct. 111, 34 L. Ed. 2d 143 (1972) ..... *passim*

United States v. Murray, 492 F.2d 178 (9th Cir., 1973) 10, 14

United States v. Scharfman, 448 F.2d 1352 (2d Cir., 1971) cert. den. 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 789 (1972) 10, 14

United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741 (1965) 26

Vonder Ahe v. Howland, 508 F.2d 364 (9th Cir., 1975) 12, 26, 27

Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) 23, 28, 31

Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341 (1914) 23

PAGE

Statutes

Annotated Code of Maryland:
Article 27, Section 551 ..... 24, 28
Article 35, Section 5 (a) 24
United States Constitution:
Amendment IV ..... *passim*
Amendment V ..... *passim*

Rules

Supreme Court Rules:
Rule 40, Section 3 1

Miscellaneous

Cornelius, *The Law of Search & Seizure*, 185 ... 25
Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer L. Rev. 741 (1974) 34

CONTENTS OF APPENDIX

PAGE

Excerpts from Transcript of Proceedings on Motions:
Austin A. Moyer—
Direct ..... A. 179
Cross Examination ..... A. 179
Redirect ..... A. 180
Recross Examination ..... A. 182
Deborah Nalls—
Direct ..... A. 184
Joseph Lawrence—
Direct ..... A. 184
Deborah Nalls (Recalled)—
Redirect ..... A. 184
Joseph Lawrence (Recalled)—
Direct ..... A. 186
Argument by State ..... A. 186
Table of Exhibits ..... A. 187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1646

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT

PRELIMINARY COMMENT

In accordance with Section 3 of Supreme Court Rule 40, the Respondent adopts from the Brief of the Petitioner the Opinions Below, Jurisdictional Statement, Constitutional Provisions and Statutes Involved and, in substance, Questions Presented for Review.

STATEMENT OF THE CASE

Although Section 3 of Supreme Court Rule 40 relates that no statement of the case need ordinarily be made by the Respondent, the Respondent deems the making of this statement of the case to be necessary because of

the manner in which the statement of the case is presented by the Petitioner.

Certiorari to the Court of Special Appeals of Maryland was granted to Petitioner, Peter C. Andresen, an attorney at law,[1] specializing in the handling of real estate settlements in Montgomery County, Maryland (A. 1). He was convicted of three counts of fraudulent misappropriation by a fiduciary and of five counts of false pretenses in the Circuit Court of Montgomery County, Maryland. Petitioner received eight concurrent two-year sentences (A. 2). Four counts of false pretenses against the Title Insurance Company of Minnesota were reversed (A. 22). The count of false pretense against Standard-Young Associates was affirmed (A. 26-27), as were the three counts of fraudulent misappropriation of funds against Pollitt, Warfield and Holtzelow, respectively (A. 18).

Armed with separate search and seizure warrants, the law office of Petitioner at 3700 Decatur Avenue and the office of Mt. Vernon Development Corporation[2] at 3514 Plyers Mill Road (A. 28) were simultaneously entered on October 30, 1972 (A. 37) by two separate search parties. The search conducted at 3700 Decatur Avenue was under the supervision of Special Investigator Joseph Lawrence, of the major frauds unit of the State's Attorney's Office for Montgomery County (A. 184). Deborah Nalls, who was employed by the Bi-County Major Frauds Unit (A. 184), also participated in the search of 3700 Decatur Avenue (A. 184-185). This

[1] Petitioner was suspended from the active practice of law on June 9, 1975 by the Maryland Court of Appeals.

[2] Petitioner was an incorporator, the resident agent agent and a director of Mount Vernon Development Corporation. Petitioner also appeared to own all of the stock of Mount Vernon (A. 100-101).

search took place between 10:30 a.m. and 3:00 p.m. (A. 185), with some of the initial period of time expended in waiting for Petitioner's counsel to arrive (A. 185). Approximately 2 to 3% of the files in that office were seized (A. 185-186). At the hearing on the Motion to Suppress, Mrs. Nalls reviewed the records seized and the reasons for the seizure of said records (R. 177-183).[3]

Austin I. Moyer, a Special Investigator for the Prince George's County State's Attorney's Office (A. 179) executed the search and seizure warrant for 3514 Plyers Mill Road (A. 179-180). There was no forced entry (A. 181), and Officer Costello appears to have been the only other person who accompanied S. I. Moyer (A. 180). This search took place for approximately four hours (A. 182), and less than 5% of the files at 3514 Plyers Mill Road were actually seized (A. 182). All of the files seized related to Lot 13T specifically or to the Potomac Woods subdivision generally (A. 182).

After a hearing on Petitioner's Motion to Suppress the evidence (A. 129), which hearing took two days, the trial court granted Petitioner's Motion to Suppress all items seized, with the exception of (1) exhibit numbers 10 to 14, inclusive, with relation to the seizure at 3514 Plyers Mill Road and (2) exhibit numbers 15 to 21 inclusive, 23, 24 and 28 to 34 inclusive, as they related to 3700 Decatur Avenue (A. 139).[4]

[3] All record references are to proceedings on the Motion to Suppress unless designated "RII" followed by a page number. In the latter instance ("RII"), the reference is to the trial of Petitioner on the merits.

[4] For a concise reference to a description of each exhibit not suppressed, as that exhibit relates to the numbered items set forth on the two returns, see Appendix entitled "Table of Exhibits" (A. 187).

This Court has granted Petitioner's Writ of Certiorari to the Court of Special Appeals of Maryland to determine whether the searches conducted violated Petitioner's (1) Fifth Amendment rights against self incrimination and his (2) Fourth Amendment right against an unreasonable search and seizure.

SUMMARY OF ARGUMENT

I.

Petitioner, an attorney-at-law, who is a sole practitioner, possesses no constitutional basis to invoke the privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction at his criminal trial of his personal handwritten notes and memoranda, books and records, which were seized from his desk and files in his personal office, under a search warrant held to be otherwise reasonable. The Respondent relies in the main upon *United States v. Blank,* 459 F.2d 383 (6th Cir., 1972) *cert. den.* 409 U.S. 887, 93 S. Ct. 111, 34 L. Ed. 2d 143 (1972), to the effect that evidence of crime lawfully seized within the constitutional framework under Amendment IV to the Constitution of the United States, is admissible in evidence without regard to a claim of privilege against self-incrimination under Amendment V to the Constitution of the United States. While *Boyd v. United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed 746 (1886), may still be viable to establish that a person may not be compelled to produce incriminating records and documents of a testimonial nature (subject only to the required business records exception), that case does not bar the introduction into evidence of documents and records seized pursuant to a judicially issued warrant, based upon probable cause, which particularly describes the place to be searched

and the things to be seized. In addition, the Respondent contends that the items so seized in the instant case were business records kept by Petitioner in his profession as an attorney-at-law, thereby negating Petitioner's argument that the records seized were private and personal only to himself.

II.

The question of whether the search of petitioner's offices was violative of Amendment IV to the Constitution of the United States was accepted for decision by the Court. Petitioner has raised five direct challenges to the search of his office:

A. Although the record does not indicate a direct offering of the search warrants into evidence, the record will ultimately show beyond any doubt that the warrants and/or the contents of the warrants were in evidence.

B. The warrants were definitely not "general" warrants under the facts of the instant case, when viewing the language of the warrants in their entirety and considering the minimal amount of evidence actually (1) seized and (2) ultimately introduced into evidence.

C. There was sufficient "fresh" probable cause from which the trial judge who issued the warrants could have found that a crime was being committed on the premises described.

D. The search party validly and legally seized records under the Plain View Doctrine, which records were admitted into evidence to negate mistake and to show a plan or scheme by which the Petitioner was tried and convicted of false pretenses and fraudulent misappropriation.

E. Because the informants in the application and affidavit were specifically named, it was not necessary to prove the credibility-reliability

and trustworthiness of said informants in accordance with the dictates of *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1974), as it relates to unnamed police informants.

ARGUMENT

I.

THE INTRODUCTION INTO EVIDENCE OF THE HANDWRITTEN NOTES AND MEMORANDA, BOOKS AND RECORDS OF AN ATTORNEY AT LAW WHICH WERE SEIZED FROM THE DESK AND FILES OF THE OFFICE OF THE ATTORNEY UNDER A SEARCH WARRANT HELD TO BE OTHERWISE REASONABLE, DOES NOT OFFEND THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES UNDER THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE.

The thrust of Petitioner's argument is directed at the alleged inconsistency between the decisions in *Hill v. Philpott,* 445 F.2d 144 (7th Cir.,1971), *cert. den.* 404 U.S. 991 (1971) and *United States v. Blank,* 459 F.2d 383 (6th Cir., 1972), *cert. den.* 409 U.S. 887, 93 S. Ct. 111, 34 L. Ed. 2d 143 (1972). In *Hill,* the Seventh Circuit held in a two-to-one decision that the introduction into evidence of a taxpayer's *personal* books and records should properly be refused on the basis of a Fifth Amendment privilege against self-incrimination, even though the same had been seized pursuant to a valid search warrant. The rationale of the majority in *Hill* was grounded upon the legal premise that the taxpayer would have been afforded his Fifth Amendment right against self-incrimination had the Government sought by subpoena or summons the same personal books and records of the taxpayer.[5]

[5] The dissent in *Hill* held that the papers sought were not so intimately confidential as to enjoy a superlative privacy which would be protected from seizure upon an adequately

In *Blank,* decided nearly one year thereafter, the Sixth Circuit held that worksheets of a sports and horse-book betting business which were seized under an admittedly valid search warrant would not be suppressed on Fifth Amendment grounds because they were not personal communications but were business accounts; that since they were not privately recorded and privately held thoughts or descriptions of events, these business records of which other persons would have knowledge were admissible in evidence if the same were obtained through a valid search warrant. The Sixth Circuit rejected the rationale of the majority decision in *Hill* that there is no distinction between records sought by subpoena and records sought by a search warrant. The rationale of the Court in *Blank* was set forth at 450 F.2d at p. 385:

> "We believe that there is a valid and important distinction between records sought by subpoena and records sought by search warrant. The subpoena *compels* the person receiving it by his own response to identify the documents delivered as the ones described in the subpoena. The search warrant involves no such element of compulsion upon an actual or potential defendant." (Emphasis added)

As succinctly espoused in the conclusion by the Court of Special Appeals of Maryland in this case (Moylan, J.): "The State here did all of the investigative work; the appellant was not *compelled* to do anything." (A. 54).

A Sixth Circuit case, *United States v. Beck,* 511 F.2d 997 (6th Cir., 1975) appears to be one of the most re-

grounded warrant. In describing the character of the papers, Judge Fairchild reasoned that the records in question were "maintained for business and professional purposes, with the knowledge and assistance of employees, and the manner in which they were alleged kept and used, made them, in a sense, instrumentalies of the tax evasion offense claimed." *Hill v. Philpott, Id.,* at page 150.

cently reported Circuit Court of Appeals case pertaining to the issue at bar. In reaffirming its position in *Blank*, the Court stated at pages 1002-1003:

> "Admitting properly seized 'personal papers' cannot violate the Fifth Amendment privilege against self-incrimination. Unlike an order which 'compels' production of evidence, *Boyd, supra,* 116 U.S. at 618, 6 S. Ct. 524, 29 L. Ed. 746 the owner of a notebook uncovered in a search in his absence is under no compulsion. See United States v. Blank, 459 F.2d 383, 385 (6th Cir. 1972), rev'g 330 F. Supp. 783 (N.D. Ohio 1971); United States v. Murray, 492 F.2d 178, 191 (9th Cir. 1973); United States v. Scharfman, 448 F.2d 1352, 1355 (2d Cir. 1971), cert. denied, 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 789 (1972). But see Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971). Being unaware of the search, he has no choice. Comment, The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations 6 Loyola (Cal.) L. Rev. 274, 290 n. 93 (1973). Couch v. United States, 409 U.S. 322, 327-336, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973), established that mandated cooperation, rather than the 'privacy' of the owned papers, is the *sine qua non* of the privilege against self-incrimination. See Comment, The Protection of Privacy by the Privilege Against Self-Incrimination: a Doctrine Laid to Rest?, 59 Iowa L. Rev. 1336 (1974). Similarly, though 'testimonial' evidence was seized in United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), the Court sustained the admission of such uncompelled evidence without feeling even the need to discuss the privilege against self-incrimination.
>
> "Though the overall search and seizure is proper and though there is no compelled cooperation, the search and seizure of the papers must also be 'reasonable.' As the Second Circuit so aptly said,
>
> > 'The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a 'diary' whose cover page bore the title 'Robberies I Have Performed.' Similarly the abhorrence generally felt with respect to 'rummaging' through the contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view.' United States v. Bennett, 409 F.2d 888, 897 (2d Cir.), cert. denied sub. nom., Haywood v. United States, 396 U.S. 852, 90 S. Ct. 113, 24 L. Ed. 2d 101 (1969), Thomas v. United States, 402 U.S. 984, 91 S. Ct. 1670, 29 L. Ed. 2d 149 (1971).

The 'search' of the spiral notebook for its communicative value and for fingerprints, see United States v. Hill, 454 F.2d 282 (9th Cir. 1972), under the present circumstances, was hardly unreasonable in that, as in *Bennett,* there was no extensive 'rummaging.' Though appellate counsel has characterized the notebook as appellant's 'private diary' (Appellant's Reply Brief at 22), the 'diary' consisted of just one page, the first page, in fact, of the notebook. United States v. Gargotto, 510 F.2d 409 (6th Cir. 1974), sustained the reasonableness of a search involving much greater 'rummaging.' Cf. *Philpott, supra* (more than thirty cartons of records seized); United States v. Zive, 299 F. Supp. 1273 (S.D.N.Y. 1973) (at least seven desk or file drawers.)"[6]

A review of the pertinent cases cited by the Sixth Circuit in Beck reveals that the Second Circuit and Ninth Circuit[7] also have adhered to the proposition set

---

[6] Testimony in the instant case revealed a seizure of less than 5% of Petitioner's files.

[7] The Eighth Circuit and the Tenth Circuit have apparently joined the growing list of Courts which have followed the lead of the Sixth Circuit decision in *United States v.*

forth in *Blank, i.e.,* business records seized by virtue of a warrant reasonable under Fourth Amendment requirements may be introduced into evidence over a Fifth Amendment objection. In *United States v. Scharfman,* 448 F.2d 1352 (2nd Cir., 1971), *cert. den.* 405 U.S. 919, 92 S. Ct. 944, 30 L. Ed. 2d 789 (1972), there was a search and seizure warrant issued for the recovery of furs from a highjacked fur shipment. During the course of the seizure of the furs, index cards and a consignment memorandum book were seized. In disposing of this point, the Second Circuit stated at page 1355:

> "Scharfman also argues that the memo book, containing entries written in his own hand, should have been suppressed because the fifth amendment would permit him to refuse to produce such evidence if he had possession. His analogy is inapposite. We held in United States v. Bennett, 409 F.2d 888, 896, cert. denied, sub nom. Jessup v. United States, 396 U.S. 852, 90 S. Ct. 376, 24 L. Ed. 2d 256, reh. denied, sub nom. Haywood v. United States, 396 U.S. 949, 90 S. Ct. 376, 24 L. Ed. 2d 256 (1969), that 'the Fourth Amendment does not protect broadly against the seizure whose compulsory production would be forbidden by the Fifth.'"

The Ninth Circuit, in *United States v. Murray,* 492 F.2d 178, 191 (9th Cir. 1973) commented:

> "3. *Seizure of address book.* Murray argues that the seizure and use in evidence of his address book and entries therein violated his Fifth Amendment privilege against self-incrimination. Murray relies

---

Blank, supra. See *Shaffer v. Wilson,* 523 F.2d 175 (10th Cir. 1975) *infra.* A Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit has been filed in this Honorable Court, entitled *Shaffer v. Wilson,* No. 75-601. See also *Taylor v. State of Minnesota,* 466 F.2d 1119 (8th Cir. 1972), *Cert. den.* 410 U.S. 956, 93 S. Ct 1425, 35 L. Ed. 2d 689 (1973).

primarily upon an observation by Justice Bradley in Boyd v. United States, 116 U.S. 616, 633, 6 S. Ct. 524, 29 L. Ed. 746 (1886), to the effect that the seizure of a person's private books and papers to be used in evidence against him is not substantially different from compelling him to be a witness against himself.

Boyd involved a self-incrimination problem because the defendant was required by court order to produce a self-incriminating invoice. No such circumstance is present here. Actually, Murray's address book could have been seized as an instrumentality of the crime under the law as it existed prior to Warden v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), which overturned the 'mere evidence' rule. *Hayden,* of course, liberalized the rule as to what items may be seized.

In *Hayden,* however, the court reserved the question of whether, in a search and seizure otherwise valid, the authorities could, in view of the privilege against self-incrimination, take items which are 'testimonial' or 'communicative' in nature. *See Hayden,* at 302-303, 87 S. Ct. 1642. But in United States v. Bennett, 409 F.2d 888, 896 (2d Cir. 1969), the Second Circuit held that such items can be taken during a lawful search and seizure and are admissible. We agree."

Recently, the Tenth Circuit had cause to review the very issues raised by the Petitioner in the case at bar. In *Shaffer v. Wilson,* 523 F.2d 175 (10th Cir. 1975), the financial records of Shaffer pertaining to his dental practice were seized incident to an otherwise valid search and seizure warrant. The search warrant authorized a search and seizure of financial and patient records, books and accounts, as well as "diverse other records of financial transactions." In discussing the

search and seizure, the facts were described, in the dissent:[8]

> "The warrant was executed by some six or eight agents appearing at the dental office of appellant, Wendell L. Shaffer, where he practiced by himself, at or shortly before he opened it for the day. This group of agents remained there for about seven hours going through all the records in the office, emptying the file cabinets, desk drawers, and closets. The papers seized were placed by the agents in some eighteen boxes and hauled away." At p. 180.

With the above factual background, Shaffer contended that (1) the seizure of his private papers as a dentist practicing as a sole practitioner violated his privilege against self-incrimination and (2) the search and seizure itself was unreasonable under the Fourth Amendment. The Tenth Circuit distinguished *Hill* by citing the fact that the Seventh Circuit "did not, however, distinguish between the 'compulsion' aspect presented via a subpoena or summons, if such there be, and lack of same under a search warrant." 523 F.2d, 177. *Vonder Ahe v. Howland*, 508 F.2d 364 (9th Cir., 1975) was also distinguished when the Tenth Circuit held that *Vonder Ahe* involved a general search warrant for the indiscriminate seizure of all the books and records, including personal and private papers, of Vonder Ahe. After reviewing all of the other cases on point which had previously been decided, the Tenth Circuit held at page 179 of 523 F.2d:

> "We accordingly hold that under the facts reflected in the record of this case, and in view of the substantial supportive legal authority, that the seizure of the records herein, pursuant to a valid search warrant, was not violative of Shaffers' Fifth Amendment privilege against self-incrimination. The materials seized were business records of which other persons must have knowledge. United States v. Blank, *supra*."

[8] The Tenth Circuit by a 2 to 1 decision affirmed the United States District Court.

In *Taylor v. State of Minnesota*, 466 F.2d 1119 (8th Cir., 1972), *cert. den.* 410 U.S. 956, 93 S. Ct. 1425, 35 L. Ed. 2d 689 (1973), Taylor also claimed that the seizure of an incriminating memorandum instructing Taylor's wife on how to prepare and condition a young woman for service as a prostitute in Taylor's stable of prostitutes, was violative of Taylor's Fifth Amendment rights. The Eighth Circuit held the memorandum to be admissible because it was not the product of any coercion.[9]

In addition to all of the above, this Court in *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 548 (1973) also appears to hold that there is a distinction between an order to produce records and the seizure of records under the authority of a warrant. In footnote 10, this Court also appeared to make the further distinction between *personal* papers and other papers in the handwriting of the accused, stating:

> "A later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the *private property* of the person claiming the privilege, or at least in his possession in a purely *personal capacity*.' United States v. White, 322 U.S. 694, 699, 64 S. Ct. 1248, 1251, 88 L. Ed. 1542 (1944)." (Emphasis in the original)

[9] With reference to Petitioner's argument relating to his Fourth Amendment rights, *infra.*, the Eighth Circuit in *Taylor* also held that the search in question was sufficiently specific so as not to amount to a general search, even though the memorandum in question was not specifically listed within the search and seizure warrant as an item to be seized.

It is for this reason that the Petitioner's reliance on *Hill*, as well as Petitioner's contention itself, is without merit. The papers seized in the instant case were not *personal* within the contemplation of the various cases. Rather, the papers seized were no more than records kept in the ordinary course of Petitioner's practice of law and reflected such items as deeds, mortgages, deeds of trust, memoranda of settlements, and the like. These were papers which were prepared as a necessity for clients, rather than papers of a purely personal nature which referred only to the private property of the Petitioner. To further illustrate that many of the items seized were not of a personal nature to Petitioner, it should be noted that the Pollitt real estate settlement was conducted by a Mr. Paxton from Petitioner's office (R. II 81), as was the real estate settlement of Mr. Warfield (R. II 108).

At first blush, it might appear as though the respective holding of the Seventh Circuit in *Hill* is inconsistent with the holdings of the Sixth Circuit in *Blank*, the Second Circuit in *Scharfman* and the Ninth Circuit in *Murray*. However, this Court appears to have already held that items lawfully seized as an incident to a valid arrest are admissible in evidence over a Fifth Amendment objection in a situation wherein the personal papers were so closely related to the business that the papers were determined to be business records. In *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927), Marron claimed that a ledger and certain bills for gas, electric light, water and telephone services, which were obtained through an illegal search and seizure, should have been excluded because of a violation of his Fourth and Fifth Amendment rights. After holding that the items in question were not admissible pursuant to the search warrant because the

same were not particularly described as things to be seized (intoxicating liquors and articles for their manufacture were described in the warrant), this Court allowed the items to be introduced in evidence for the following reason:

> "The bills for gas, electric light, or, and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest." 48 S. Ct. at 77; 275 U.S. at 199.

It is, therefore, evident that this Court has already ruled that the Fifth Amendment privilege against self-incrimination will not attach in situations where evidence is otherwise legally obtained. While it may be true that the evidence in *Marron* was admissible by virtue of a valid arrest, the Respondent would submit that the seizure of such items pursuant to a search warrant would be admissible in evidence by analogy. The records in *Marron* were allowed in evidence as closely related to the business of Marron. In similar fashion, the records seized from the Petitioner were actually used in carrying on the Petitioner's profession as an attorney at law. Furthermore, the seized records were not personal by any stretch of the imagination, and even though some of the papers may have been in Petitioner's handwriting, the seized records were nothing more than business records kept in the ordinary course of Petitioner's profession as an attorney at law.

In a somewhat related case involving Petitioner's records, the Court of Appeals of Maryland (Murphy, C.J.) held that Petitioner was required to produce his

records for a Court-ordered audit upon its finding that such records were required to be kept in Petitioner's business (real estate settlement records). *Andresen v. Bar Association of Montgomery County,* 269 Md. 313 305 A.2d 845 (1973).

Petitioner's reliance upon *Bellis v. Unted States,* 417 U.S. 85, 94 S. Ct. 2179, ___ L. Ed. 2d. ___ (1974) is totally unfounded. Unlike the facts in the instant case where a warrant issued, Bellis was subjected to a *subpoena* for certain partnership records. The Respondent acknowledges the possible difference between a valid search and seizure warrant on the one hand and a subpoena on the other hand. In the former, an individual is not directly compelled to incriminate himself; in the latter, an individual would have to bring the records to the proper governmental authority and might thereby be incriminating himself.

The Respondent would take issue with the blunt statement of the Petitioner that this Court in *Bellis* "cited with unanimous approval" the holding in *Hill* (Br. 12). It must be noted that the citing of *Hill* in *Bellis* follows a reference to *Boyd.* This Court in *Bellis* at 94 S. Ct. 2182, referred to *Boyd* as holding that there is a Fifth Amendment privilege against *forcible and compulsory extortion* . . . of [a man's] *private papers* to be used as evidence to convict him of a crime . . .". Citing *Boyd* at 6 S. Ct. 630 (Emphasis added). Then, this Court appeared to relate that the prohibition against *forcible and compulsory extortion* of a man's *private papers* applied to the business records of a sole practitioner.

In the instant case, there was no *extortion,* forcibly and compulsory or otherwise, of the *private papers* of the Petitioner. Respondent would submit that the reference to *Hill* in the above context is a far cry from

Petitioner's contention that there was an unanimous statement in *Hill* that no business records of a sole practitioner are ever subject to a valid search and seizure warrant. This is especially true when considering that *Bellis,* like its predecessor *Boyd,* involved a *subpoena,* which if the items subpoenaed were incriminatory, would have amounted to legal process to force the accused individual to personally produce and authenticate evidence of a personal nature which might tend to incriminate himself. In the instant case, there was a seizure "under a *search warrant* held to be othewise reasonable." In the former situation, *i.e.,* a subpoena, the Fifth Amendment is directly brought to the fore. In the latter instance, *i.e,* a search warrant otherwise held to be reasonable, the Fourth Amendment is directly involved.

The Respondent would submit that the authors who framed both Amendments to the Constitution of the United States had every intention of giving to both the Fourth and Fifth Amendments an equal position in attempting to guarantee the rights of a person against *unreasonable* searches and seizures and against compelled self-incrimination, respectively. There does not appear to be any valid reason for granting preferential treatment to the Fifth Amendment in derogation of the Fourth Amendment. The rights of an individual surely must be guaranteed, but the rights of society also must be protected. To take Petitioner's theory to its ultimate conclusion would grant unto any sole proprietor or sole practitioner total exemption from a valid search warrant in all instances where some of the legally seized documents are in the actual handwriting of the person against whom the reasonable search and seizure is directed. This should not be the law of the land, and the Respondent respectfully submits that it is not the law of the land.

The Respondent would further adhere to the finding of the Court of Special Appeals of Maryland, when that Court held:

> ". . . Another part of *Boyd*, however — that relied upon by the appellant here — is a quaint anachronism of no current vitality. That is its so-called "mystic union of the Fourth and Fifth Amendments." That was a now outdated legal fiction by which justices and judges aggrieved at Fourth Amendment violations by the police could get around the absence of an exclusionary rule. By reading the Fourth Amendment violation as tantamount to compelled (and therefore forbidden) self-incrimination under the Fifth Amendment, exclusion was achieved. The notion was rendered obsolete in the federal courts by the adoption of an exclusionary rule as part of the Fourth Amendment in *Weeks v. United States, supra,* in 1914, and in the state courts by *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, in 1961. The divorce between the Fourth Amendment and the Fifth Amendment is now universally recognized. *Gilbert v. California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967); *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). *Marron v. United States,* 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (1927) involved the legitimate seizure of incriminating business records." (A. 52-53).

In his Brief, Petitioner has set forth certain specific contentions which require point-by-point response. Petitioner alleges:

> ". . . that the State of Maryland does not contend, nor did the state courts take issue with the fact that the papers seized and admitted into evidence over objection in petitioner's case were personal papers of the type which would ordinarily be privileged and could not be used against him. Both the respondent and the state courts readily admit that, if the subject documents had been sought by subpoena, rather than seized, they would have been privileged. (A. 51, 142). They, however, each conclude that, because the search and seizure of the papers was held to be reasonable, the Fifth Amendment protections therefore do not apply because petitioner 'was not compelled to do anything'. (A. 51-4)" (Dif. 13)

A reading of the references cited by Petitioner does not reveal any such admission. At best, Petitioner arguably may contend that there may have been an inference that the documents in evidence were personal papers. It does not appear as though the trial court or the Maryland appellate court specifically held the papers to be personal and privileged. Both the opinion of the trial court (A. 142) and the opinion of the Court of Special Appeals (A. 51-54) found that the papers reasonably seized from Petitioner were admissible in evidence. However, neither court held, as Petitioner would lead this Court to believe, that there was a concession that the seized documents were personal and privileged. To the contrary, the trial court merely reaffirmed that any purely personal papers sought through a subpoena *duces tecum,* which an individual contended might tend to incriminate him, could be challenged as having been obtained in violation of the Fifth Amendment (A. 142). The Court of Special Appeals, of Maryland in holding to the same legal premise, stated:

> "The State's position, on the other hand, is that it proceeded exclusively on a Fourth Amendment basis, whereunder probable cause will justify a court's warrant to search for and to seize incriminating evidence, and not upon a Fifth Amendment basis, whereunder a suspect is required by subpoena to present for examination his records which *may* be incriminating." (A. 51) (Emphasis in original).

Because the State took the position that the documents were admissible in evidence by virtue of the Fourth Amendment, it was not necessary for the courts to even reach the issue of whether the fruits of the reasonable search were private and personal to the Petitioner, or alternatively were records kept in the course of Petitioner's profession as an attorney at law. The acknowledgement that the records seized in the instant case may have been constitutionally protected upon a Fifth Amendment privilege, had the same been sought by virtue of a subpoena, does not equate with a concession that the records seized were private and personal to Petitioner.

Although Petitioner exclaims that this portion of the Respondent's argument relating to business records "comes too late" (Br. 13), a review of the record shows otherwise. In his original brief to the Court of Special Appeals, Petitioner acknowledged that the items seized were his "private files and notes and other papers involving transactions, legal cases and law suits *concerning his clients*, their wills and other private and secret communications protected by the *attorney-client privilege*" (Br. 57 of Petitioner's brief to the Court of Special Appeals). (Emphasis added). Therefore, by Petitioner's own admission, the items seized were business records pertaining to his clients to which he raised an alleged attorney-client privilege. In addition, this very point was well preserved at the time of trial when the State made specific reference to business records (A. 179-180)[10]

[10] Respondent has found it necessary to include an Appendix in addition to the ones filed by Petitioner. Respondent is cognizant of the Supreme Court Rules relative to a Single Appendix. However, Petitioner was to have the designated portions of the record to the Respondent by October 16, 1975. On November 6, 1975, the Petitioner wrote a letter to Respondent suggesting the inclusion of portions of several pages. Thereafter, Petitioner's Appendix was received.

For continuity, Respondent's Appendix is numbered consecutively to Appellee's Appendix, beginning with A. 179, and is found at the end of Respondent's Brief.

Reliance by Petitioner upon *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973)[11] to support his contention is without merit (Br. 14). There is no quarrel with Petitioner's position that he retained possession and possibly even ownership of the records seized. But, this does not transpose business records into private and personal communicative writings. Nor does the fact that "[m]any, if not most, of the seized papers introduced, over objection . . . were shown to be in the personal handwriting of the petitioner" (Br. 15) allow for an additional transposition of business records into records of a private and personal nature.

Petitioner also mentions:

> "In petitioner's case, the "5% seized" amounted to literally thousands of papers which later filled several file cabinet drawers in the office of the States Attorney. (See Returns at A. 119, 122, which each folder contained approximately 50 to 100 and sometimes over 200 pages). Every wer (sic) drawer in petitioner's desk, and each and every adjoining desk, every file in every bookcase and credenza and each of over twenty file cabinet drawers were searched. Most important was the scope of the search wherein virtually *every one* of the thousands of papers present therein were scanned and most were examined with detail. The searchers, approximately eight in number, spent the better part of six hours conducting the search." (Br. 19).

[11] Petitioner also relies later upon the concurring opinion of Mr. Justice Brennan in *Couch* (Br. 16).

There is no documentary evidence in the Appendix to illustrate the "thousands of papers" presented, nor the number of papers in each folder, nor the fact that every desk drawer and every file cabinet drawer was searched. The total number of papers seized represented less than five per cent (5%) of all papers in Petitioner's office according to one witness (A. 183), and as few as two or three per cent (2-3%) according to another witness (A. 186). With this small percentage of items seized, all records which appeared on the return but did not pertain to the instant case were excluded by the trial court (A. 143-144). All files seized related to Potomac Woods (A. 182), and the search took approximately four (4) hours at the Plyers Mill Road office (A. 182). The search at Decatur Road was from 10:30 a.m. until 3:00 p.m., but part of the delay was occasioned by Petitioner's attempt to reach his attorney by telephone, and to have the search delayed until his attorney arrived (A. 185).[12]

The Petitioner quotes the following from *Hale v. Henkle*, 201 U.S. 43, 76, 26 S. Ct. 370, 379 (1906) (Br. 21):

> ". . . the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum* against which the person, . . . is entitled."

Notwithstanding that *Hale* involved a *subpoena duces tecum* and a Fourth Amendment breach, which are immediate differentiations from the instant case, a precise reading of *Hale* leads one only to the conclusion that the word "offense" relates to an unreasonable search and seizure. In this context, the Respondent would agree that evidence seized by an unreasonable search and seizure is to be suppressed, regardless of

[12] After some delay, the search began and Petitioner's attorney arrived thereafter (A. 185).

whether the compulsory production of *private* papers is objected to under a search warrant or a *subpoena duces tecum*.

Petitioner next cites *Weeks v. United States*, 232 U.S. 383, 397, 34 S. Ct. 341, 346 (1914), which Petitioner claims held:

> ". . . as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person, . . . is entitled to protection." (Br. 23).

A review of the above quote as cited in *Weeks* only reveals that the credit for the quote was given to *Hale v. Henkle, supra*. In addition, there was no search warrant in *Weeks*, whereas the search warrant in the instant case was held to be "otherwise reasonable."

Petitioner next argues that *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), does not overrule *Gouled v. United States*, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921) (Br. 23-24), because Warden involved clothing which was not testimonial or communicative in nature, but rather was mere evidence. This is exactly the reason why *Warden* overruled *Gouled*! Prior to *Warden, Gouled* had restricted lawful seizures to contraband, as well as fruits and instrumentalities of a crime. *Warden* held that "mere evidence" of a crime is admissible in evidence, provided it is lawfully obtained. In like context, although the records seized from the Petitioner may not have been the fruits or instrumentalities of a crime, *per se*, and therefore perhaps not admissible pre-*Warden*, the records seized were evidence of a crime and were admissible post-*Warden*.

Lastly, Petitioner claims that the admission of the evidence seized under the search warrant for false

pretenses, a misdemeanor, was prohibited by virtue of Article 35, Section 5(a) of the Annotated Code of Maryland (1971 Repl. Vol., as amended). Petitioner further contends that the "Court of Special Appeals refused to comment on [Article 35, Section 5 (a)]" (Br. 26). As in the case with Article 27, Section 551 of the Annotated Code of Maryland (1971 Repl. Vol.), upon which the Court of Special Appeals did comment, "[i]nadvertently (or advertently), the [Petitioner] did not read on . . ." (A. 37). Section 5(a) in its entirety set forth:

> "No evidence in the trial of misdemeanors shall be deemed admissible *where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search and seizure prohibited* by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case." (Emphasis Added).

Since the warrant in the instant case was determined to be otherwise reasonable, no additional comment was required before the Court of Special Appeals, nor at the present time in this brief.

For the foregoing reasons, the Respondent would submit firstly that the items seized under the otherwise valid search and seizure warrant were not purely personal to the Petitioner, and were therefore admissible into evidence. Secondly, unlike records requested through the issuance of a subpoena which might compel a person to give incriminating evidence against himself, items legally seized under the authority of a valid search and seizure warrant in accordance with the Fourth Amendment do not offend the Fifth

Amendment guarantee against compelled self-incrimination.

II.

THE SEARCH OF PETITIONER'S OFFICES WAS NOT VIOLATIVE OF AMENDMENT IV TO THE CONSTITUTION OF THE UNITED STATES.

(A) *Search Warrants Were Introduced Into Evidence.*

The Respondent does not take issue with the authority cited by the Petitioner that a search warrant under which the evidence was obtained must be introduced in evidence (Br. 26). The short answer to Petitioner's contention lies in the fact that the record in the instant case revealed that the search warrant was apparently introduced into evidence (A. 28-33).

In addition, even the quote set forth in Petitioner's brief from Cornelius, *The Law of Search and Seizure,* 185, stated that a conviction cannot be sustained if not established by the introduction of the warrant itself, *or by proof of its contents.* (Br. 26). Assuming *arguendo* that there was not a formal introduction of the warrants into evidence, the proof of the contents of the warrants was so exact as to cause the Court of Special Appeals to conclude that the warrants had been introduced into evidence (A. 28-33). Respondent adopts the facts as set forth by the Court of Special Appeals of Maryland in its opinion A. 28-33 to demonstrate the completeness of the proof of the contents of the warrants.

(B) *The Warrants in the Instant Case Did Not Amount to "General" Warrants.*

The Petitioner appears to acknowledge that the warrants in the instant case described with particular-

ity the items to be seized. However, Petitioner argues that the addition of the words "together with other fruits, instrumentalities and evidence of crime at this time unknown" would cause the particular warrants to become general warrants. In explaining the additional words, the Court of Special Appeals concluded:

> "A reading of the warrants *in full*, however, makes it apparent that the suspect phrase is tied explicitly to those items which might show a violation of the false pretenses law with respect to the sale of Lot 13T" (A. 34). (Emphasis added)

The Respondent adheres to the reasoning of the Court of Special Appeals of Maryland, especially in light of the fact that this Court has oft times held that an affidavit should be interpreted in a common-sense and not a hypothetical manner, and that the resolution of doubtful or marginal cases should be largely determined by the preference accorded to warrants. *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

In arguing that the warrants in the instant case were general warrants, the Petitioner places primary reliance, on *Vonder Ahe v. Howland, supra*. Such reliance is unfounded. Pursuant to an audit, Vonder Ahe presented Internal Revenue Service agents with certain records. Subsequently, the agent discovered that the white cards which were presented to him represented the regular patients of Vonder Ahe, who was a dentist. The agent subsequently discovered that there was a separate set of yellow sheets and green cards for emergency patients, which were not included in the audit. The agents obtained warrants to seize all books and records, and the warrants were executed not only at the office of Vonder Ahe, but also at his home. The Court held that there was no probable cause shown for

the seizure of *all* of the doctor's dental books and records, or his personal and private papers. At page 369, the Court stated:

> "What is 'overly broad' cannot be resolved in an abstract or academic manner but only in relation to the facts, circumstances under, and the purpose for, which the warrants were issued. The warrants here were, in effect, general warrants. They sought all fiscal records of the doctor from January 1, 1966 to date [June 1970] . . . In short, except for the yellow sheets and green cards, this was the indentical material which had been delivered to and examined by Agent Holmes."

It can be seen that probable cause may have been lacking in *Vonder Ahe* where the agents "Proceeded . . . to ransack both office and home [of Vonder Ahe] and to asport practically every piece of paper they could lay their hands on" (at page 365). However, in the instant case, the testimony revealed that only between two and five per cent of Petitioner's papers were actually seized by the agents pursuant to the search warrants. Accordingly, the warrants in the instant case when considered in their entirety were not general warrants, and there was probable cause for the seizure of the relatively minute portion of Petitioner's records.

As pointed out in Footnote 16 in *Stanford v. State of Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 431 (1965) the "scrupulous exactitude" required to describe books to be seized when the basis for the seizure is the ideas contained therein does not apply necessarily full force where the books and records described are "no more than a ledger of unlawful enterprise". See *Marron v. United States, supra*. Without contravention Petitioner's books and records were purely and simply his ledger of unlawful enterprise.

(C) *It Was Not Impossible For the Trial Judge Who Issued the Warrants to Have Made The Finding That Probable Cause Was Demonstrated That A Crime Was Being Committed on the Premises.*

Petitioner contends that since one of the elements of the crime of false pretenses includes a false representation of a *past or existing fact,* it is impossible for the affidavit in the warrant to set forth that there is probable cause to believe that the laws relating to false pretenses were then being violated upon the premises. Petitioner believes that it is not possible for a crime to be *presently* being committed, when one of the elements of the crime itself is a false representation of a past or existing fact. However, the above allegations are merely a play on words. Section 551 of Article 27 of the Annotated Code of Maryland (1974 Cum. Supp.) provides that a search warrant may issue under a proper application and affidavit for any building wherein property subject to seizure under the criminal laws of the State is situated or located. It is apparent that the use of the phrase in the affidavit that the crime was presently being committed relates to the documents which were then on the premises. To hold otherwise, a warrant could never issue in a case of false pretenses because the facts represented would have already been acts of past history.

In addition to reliance upon *Ventresca* with relation to the preference to be afforded warrants, the Respondent also submits that *Warden v. Hayden, supra* is sufficient to dispell the argument of the Petitioner. Warden made it clear that any evidence of a past crime is subject to seizure under the Fourth Amendment.

As pointed out by the Court of Special Appeals (A. 37):

". . . He argues that the warrant applications of October 30, 1972, focus upon an alleged crime of false pretenses that was consummated and complete, by the very allegations in the warrant applications, on July 17, 1972. He reasons that on October 30, the crime was already an act of history and was not *still being committed.* Inadvertently (or advertently), the appellant did not read on in § 551, wherein the very next clause sets out the additional legitimate object of a search warrant: "or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing." That any evidence of past crime — including "mere evidence" in contrast to contraband, fruits or instrumentalities — is seizable under the Fourth Amendment was made clear by *Warden v. Hayden, supra."*

In the same argument, Petitioner contends that the Judge who issued the search warrants did so on the basis of "stale" probable cause. The applications for the search warrants were dated October 30, 1972 (A. 97). A review of the two applications for the search warrants indicates that George Young and Audrey E. Young were last interviewed on October 25, 1972 (A. 97-98); that the State National Bank deed of trust was not released until October 3, 1972 (A. 104); that this release of October 3, 1972 was confirmed by the Senior Vice President of State National Bank on October 26, 1972 (A. 104); that there was not a release of a deed of trust to Madison National Bank as of October 27, 1972 (A. 104), and that all of the deeds of trust involved related to Lot 13T. Although there may have been extensive investigation over a period of several months, this was necessitated by the complex nature of the investigation, including the interviews with numerous individuals, the inquiry into certain corporate ventures of Petitioner,

and the need to complete sufficient title examinations to verify the information obtained from the various sources. As succinctly stated by the Court of Special Appeals of Maryland:

> "The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. . . . The massive records and files of the appellant-attorney and his protean corporate extensions in this case are more akin to the latter [tortise] than to the former [hare]. In terms of non-staleness, the probable cause here was still as the first dew of the morn" (A. 40).

(D) *The Principals and Prefaces Annunciated By This Court in Warden v. Hayden, were not Violated By The Court of Special Appeals in Upholding The Admission of Certain Items into Evidence Which Were Obtained By the Search and Seizure in Question.*

Petitioner takes issue with regard to several other items seized, which did not specifically relate to Lot 13T. In particular, the Petitioner refers to the opinion of the Court of Special Appeals:

> "Several other items seized, although not relating to Lot 13T specifically, showed a general pattern of operation on the part of the appellant with respect to unreleased deeds of trust on other properties in Potomac Woods and, therefore, negated any suggestion of mere mistake or lack of knowledge on his part when it came to his false representations as to Lot 13T. Because of their bearing on the critical question of the appellant's *mens rea,* we hold that they too were seizable evidence under the warrants. Alternatively, they were evidence of other crimes, their character as criminal evidence obvious to the searching party by the requisite standard of probable cause, and, therefore, seizable warrantlessly under the Plain View Doctrine." (A. 47-48).

Relying upon *Warden v. Hayden, supra,* the Petitioner contends that the papers seized "were not used by the prosecutor in an attempt to establish *mens rea* as to false pretenses." (Br. 34-35). The crime of false pretenses is committed when a person (1) by making a false representation of a past or existing fact (2) with intent to defraud, and (3) with knowledge of its falsity, (4) obtains any chattel, money or valuable security from another (5) who relies on the fase representation (6) to his detriment. *Polisher v. State,* 11 Md. App. 555, 276 A.2d 102 (1972). By the very definition and elements relating to false pretenses, it is incumbent upon the prosecutor to show that there was an intent to defraud, rather than a mistake on behalf of the accused. For this reason, it was permissible in the instant case for the other items seized to be introduced into evidence to show a general pattern of operation, rather than a mistake, on the part of the Petitioner with respect to unreleased deeds of trust on properties other than Lot 13T. This Court has also adhered to the same doctrine. In *Nye & Nissen, et al. v. United States,* 336 U.S. 613, 69 S. Ct. 766, 93 L. Ed. 919 (1949), a case involving the substantive crime of false pretenses, this Court cited with approval the introduction of evidence of crimes similar to those charged in order to prove the guilty intent of the accused. At page 618 of 336 U.S., this Court stated:

> "The evidence showed the presentation of eleven other false invoices. This was part of the evidence received in support of a conspiracy count. The trial court also admitted it at the conclusion of the case 'for the sole purpose of proving guilty intent, motive, or guilty knowledge' of the defendants. Evidence that similar and related offenses were committed in this period tended to show a consistent pattern of conduct highly relevant to the issue of intent."

After referring to the exhibits which passed constitutional muster because they related specifically to Lot 13T (A. 46-47), the Court of Special Appeals referred to the "other items seized" to show a general pattern of operation by the Petitioner with respect to unreleased deeds of trust on other properties in the Potomac Woods subdivision (A. 47-48). These exhibits were held to have been admissible in evidence because:

> "Alternatively, they were evidence of other crimes, their character as criminal evidence obvious to the searching party by the requisite standard of probable cause, and, therefore, seizable warrantlessly under the Plain View Doctrine." (A. 47-48).

The search party being on the premises lawfully by virtue of the search and seizure warrant, and looking for items pertaining to the unreleased deeds of trust on Lot 13T, apparently knew of other lots in the Potomac Woods subdivision wherein deeds of trust had not been released, even though settlement on those particular lots had previously taken place. Because these latter files and documents were in plain view of the searching party, the same were subjected to seizure and properly admissible into evidence.

(E) *The Two-Pronged Test of Credibility-Liability and Trustworthiness of the Non-Swearing Informants Was Satisfied.*

Relying upon *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1974), the Petitioner challenges the veracity of the informants set forth in the affidavit to the warrant. As aptly pointed out by the Court of Special Appeals in its opinion, *Aguilar* related to the rule set forth for the establishing of the credibility of unnamed police informers rather than disinterested civilian sources of information (A. 42-44). In the instant

case, secondary sources of information were all named and identified in the affidavit. These named individuals were either victims of the crime, disinterested civilian sources of information, or other law enforcement officers. For this reason, the Petitioner's contention is without merit.

In support of his final contention, the Petitioner argues that Hecht and Covert were not disinterested witnesses or victims of a crime, but were actually deeply embroiled in a civil controversy with the Petitioner (Br. 36). A review of the entire application and affidavit for the search warrants is sufficient to dispell the allegations made by the Petitioner. This is substantiated by the opinion of the Court of Special Appeals, wherein the Court held:

> "George and Audrey Young were the secretary and president, respectively, of the victimized company. Ira Burdette was the general superintendent for the appellant's construction business. John Sivers was a corporation president. Robert Freedman was general counsel and director of a savings and loan association. Frank Marsalek was executive vice president of a land title corporation. Charles Bieber worked for Mt. Vernon Development Corporation. June Stup was the appellant's secretary. Carl Zentz was the appellant's title searcher. Bruce Covert and Norman Hecht were vice presidents of banks. Deborah Nalls was a real estate law expert assigned to the Bi-County Fraud Unit. We are persuaded that none of the informants were anonymous police informers 'from the underworld milieu' but were rather either 'victims of crime, the disinterested witnesses of crime, other disinterested civilian sources of information or other law enforcement officers.' As we said in *Dawson v. State*, 11 Md. App. 694, 699, 276 A.2d 680:
>
> > 'The practical distinction is that in dealing with a named source, the very naming of the

> source and the relationship of the source to the observed information may go a long way (or even be sufficient unto itself), under the facts of a particular case, to establish the credibility of that source or the reliability of his information.'

And see Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 Mercer L. Rev. 741 (1974), pp. 765-773, 'The Problem of the Citizen-Informer.'" (A. 43-44).

Regardless of whether Hecht and Covert "were embroiled" in a pre-existing civil controversy with Petitioner (which is nowhere established in the Record) they were fully *identified* informants and qualified as disinterested witnesses or sources of information and qualified sources to produce in support of the application for a search and seizure warrant. Accordingly, Petitioner's contention that the reliability and trustworthiness of the non-swearing informants was not satisfied, is without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Special Appeals of Maryland should be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,
JON F. OSTER,
Deputy Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
GILBERT ROSENTHAL,
Assistant Attorney General
of Maryland,
One South Calvert Building,
Baltimore, Maryland 21202.
For Respondent.

APPENDIX

(See Footnote 9 for Statement of Reasons for inclusion for an additional Appendix in the Brief of Respondent)

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS ON MOTIONS

AUSTIN A MOYER,

called by the defendant, having been duly sworn, deposes and says:

DIRECT EXAMINATION

By Mr. Lamb:

[18] Q. Kindly state your full name. A. Austin A. Moyer.

Q. Where are you employed, sir? A. I am a special investigator for the Prince George's County State's Attorney's Office.

Q. And back in January of 1972 where were you employed, sir? A. The Bi-County Major Frauds Unit.

* * * * * *

CROSS EXAMINATION

By Mr. Werner:

[42] Q. Mr. Moyer, when this affidavit and the affidavit of, let's say the companion search warrant which is similar to it, [43] were prepared, did this take several days? A. Yes.

Q. And did you work with other persons in preparing it? A. Yes, I did.

Q. What other persons did you work with? A. Agent Lawrence, Debbie Nalls, yourself and the secretary.

Q. And you worked as a team, did you, or did you not? A. Oh yes.

Q. And afterward you read the affidavits thoroughly? A. Yes, I did.

Q. And at that time you understood them? A. Yes, I did.

Q. And did you have numerous documents from which you culled certain information which was included in the affidavit? A. Yes, I did.

Q. Were they voluminous documents? A. Yes, they were.

Q. And did you also have numerous interviews and reports of your own and other investigators? A. Yes, I did.

* * * * * *

[47] (Mr. Lamb) Your Honor, may I point out something. We might as well make the return on the warrant part of Defendant's Exhibit 1, the return on the warrant itself for Plyers Mill Road. That's only the warrant and the application.

(The Court) All right, put the return with it. You don't have the return?

(Mr. Lamb) No, Your Honor, I only have my copy of it.

(Mr. Werner) Here it is.

[48] (The Court) We're putting the return with Exhibit 10 — we're talking about — we're connecting the report and return with the affidavit and the search warrant as Defendant's Exhibit 1.

(Mr. Lamb) I want to be sure he's looking at—

(The Court) Introduce the other search warrant with the affidavit — that's 10.

(Mr. Werner) Nine.

* * * * * *

REDIRECT EXAMINATION

[64] Q. And when you went to that location to execute the warrant, was anybody physically present at that time? A. Yes, sir.

Q. Who was there? A. Officer Costello.

Q. He was with you when you executed the warrant? A. Yes.

Q. Was any layman citizen there at that time? A. We were allowed onto the premises after notifying a

gentleman who stated he was the manager of the building, and telling him that we had a search warrant for the premises, and in about an hour—

* * * * * *

[65] Q. Now, when you got inside, did somebody let you in the back door? A. Yes.

Q. And was that a person who said he worked at that location? A. There was a person who said he was manager of the building.

Q. Oh, you used a passkey, there was not— A. There was no forced entry, no, sir.

* * * * * *

[70] Q. Did they in fact tell you that Mr. Andresen kept some of his files over at Plyers Mill Road address? A. That there was a possibility that there could be some of his files at that address, yes.

Q. In addition to the Mount Vernon Development files? A. In addition to the Mount Vernon Development files.

Q. And when you looked through the files of Potomac Woods subdivision, you did not see anything in particular that had a direct bearing on Lot 13T and the false pretense you had investigated? A. I would say yes, I did.

Q. In all the files? A. In all the files.

Q. Were they settlement sheets? A. Whatever their title was, they depicted or they indicated persons involved in the transaction of 13T that I thought tended to relate to the search warrant.

[71] Q. But you had no understanding when you effected the search warrant that those particular files had any direct bearing on 13T, is that correct? A. I believed them to have direct reference to 13T as a result of association, names of people involved.

Q. So the only basis upon which you seized the file was that it actually was named Potomac Woods subdivision and a lot you were referring to in the affidavit was contained in Potomac Woods subdivi-

sion? A. I'm sorry, I misunderstood your question, or I didn't understand the question.

Q. The only basis upon which you seized the files of Potomac Woods A, B and General was because, Number 1, the file was designated "Potomac Woods" and number two, your entire investigation — well, not the entire investigation, I withdraw that — your investigation which resulted in the issuance of the search warrant had been directly related to Lot 13T which is a lot in Potomac Woods Subdivision? A. And other lots. The investigation covered other lots.

Q. But the affidavit in the search warrant didn't cover any other lots? A. Not the affidavit, no, sir.

Q. So you were seizing evidence that was — that you were interested in as a result of your prior investigation which was not contained in the search warrant at all? [72] A. I didn't know whether it was directly contained — whether it was that direct or not, but it did refer to it — that's what I believed at that time.

Q. So you seized everything and anything which had anything to do with any names and subdivision which you came across in your investigation of Mr. Andresen? A. No, sir, I left many things there.

Q. But anything relating to Potomac Woods you took? A. Anything relating to Potomac Woods I took, yes.

* * * * * *

RECROSS EXAMINATION

[75] Q. Was there anyone else there during the course of the search who otherwise identified themselves with the premises? A. No.

Q. How long did the search take? A. Approximately four hours.

Q. Okay, and can you describe the general physical condition of the premises at the time of your arrival and entry. A. There were, I believe, four desks, could have been five, in a row on the left-hand side; numerous files on the right-hand wall as you enter — box files. There were other files in the rear of the building and there

were items that were in front of them, I think there was a desk back there not being used; there were things piled on it.

Q. What was the condition of the premises with respect to its neatness and orderliness? A. It wasn't the neatest office I've ever been in.

Q. And during the course of your conduct did you have occasion to examine the files in connection with what you thought were the dictates of the search warrant? A. Yes.

Q. Did you look in the file cabinets, desk drawers and various other places in the premises? A. Yes.

Q. When you concluded your investigation, what was the [76] condition of the premises with respect to neatness and orderliness? A. Similar to as I had found it.

Q. Now, you have here displayed on a table from which you removed Defendant's Exhibits 2 through 8, other files contained in what might be described as cardboard boxes of the type and variety one might find in the supermarket, let's say, to hold small canned goods. Are these the other items you seized from that location? A. Yes, they are.

Q. So you got about two cardboard boxes of files? A. Yes.

Q. How does that compare with the total number of files and papers that were present on the premises that you searched?

* * * * * *

(Mr. Werner) What other papers, files and documents were on the premises in quantity, compared to those which you seized? A. I would say what appears on the table there represents no more than — less than five per cent of all that was in the office at that time.

* * * * * *

[126] DEBORAH NALLS,

a witness called by the State of Maryland, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Werner:

Q. Please identify yourself. A. My name is Deborah Nalls; I work for the Bi-County Major Frauds Unit.

* * * * * *

[144] JOSEPH LAWRENCE,

a witness for the State, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lamb:

Q. State your full name, and your current occupation, for the record, please. A. My name is Joseph Lawrence, I am a special investigator for the State's Attorney's Office, Montgomery County, assigned to the Bi-County Major Frauds Unit which comes under the auspices of the State's Attorneys for Montgomery and Prince George's Counties.

* * * * * *

[145] Q. Did there come a time when you participated in the execution of a search warrant on the premises known as 3700 Decatur Avenue, Kensington, Maryland? A. Yes.

* * * * * *

[168] DEBORAH NALLS,

originally called by the State, was thereupon recalled by the State, and reminded that she was still under oath.

* * * * * *

REDIRECT EXAMINATION

By Mr. Werner:

Q. Directing your attention to on or about 30 or 31 October, 1972, did you have occasion to be part of a search party that was in the process of executing a

search warrant at 3700 Decatur Avenue, Kensington, the premises known as the law offices of Peter C. Andresen? A. Yes, I did.

Q. And were you in the presence of a Montgomery County police officer or officers? A. Yes, I was.

Q. Approximately what time in the day was this search [169] warrant executed? A. It was in the morning, approximately ten-thirty.

* * * * * *

(Mr. Werner) Mrs. Nalls, approximately what time did you conclude the search? [170] A. In the afternoon, I would say approximately three o'clock.

Q. So from ten-thirty to three o'clock; and was Mr. Joseph Lawrence in your presence as part of the search party? A. Yes, he was.

* * * * * *

[175] Q. Mr. Andresen was able to move freely about the office during the course of your search? A. Yes, he did.

Q. As a matter of fact, was Mr. Lamb, the defense attorney, there present? A. He wasn't there, I would say, for the first half of the search — he was tied up; but he did come in time for the second half of the search.

Q. And did you immediately execute the search warrant upon having it read to Mr. Andresen? A. No, there was a short delay. Mr. Andresen first of all said — he insisted on contacting his attorney and was not able to reach Mr. Lamb. He demanded that we wait until he was able to reach Mr. Lamb. The policeman who was in charge of executing the warrant formally read it to him and so on and said — we waited for him to call and he wasn't able to reach him and didn't know when he would be able to reach him, so we said we would have to proceed with the search.

* * * * * *

[176] Q. So of the documents you seized, what percentage of all books, records, documents and papers in the entire office did you seize? I understand it's an

estimate. A. A very small percentage. I would say at the most, two or three per cent.

* * * * * *

[278] AGENT LAWRENCE,

thereupon was recalled by the prosecution, resumed the witness stand, was reminded that he was still under oath and testified as follows:

DIRECT EXAMINATION

By Mr. Werner:

Q. Mr. Lawrence, did you have occasion to participate in the execution of the search warrant of the premises, 3700 Decatur Avenue, the law offices of Peter C. Andresen, on or about the 30th of October, 1972? A. I did.

Q. In your company was there a Mrs. Deborah Nalls as part of the search party? A. She was.

* * * * * *

[355] (The Court) What about the Fifth Amendment aspect of it?

(Mr. Werner) Okay, in order for there to be a Fifth Amendment protection in personal papers, and I stress the word "personal" — A, there must be — they have to be personal communications and not business records. We set forth in our memorandum those cases which support that. There is a case about gambling records and a case about a personal diary where the court held that these were not personal records, these were business records and documents. Mr. Andresen was engaged in the profession of law; these were settlement documents and papers, they were described as such; Your Honor has seen them; [356] they are such. Law is a business in its general sense and these are most certainly business documents. . . . The cases talk about the real evil that the amendment is intended to guard against, and that is the rummaging search, but there is a quotation somewhere in there which indicates that it would almost be folly to conclude that if a man were to reduce his thoughts to paper, he could avoid almost any crime that might be proven through those documents,

and that is why the business records exception, or the records being business and not personal are excepted from the Fifth Amendment.

Now, that is the "A" part of it, and he does not meet the "A" part of it, business records — it is business records and not personal records. . . .

TABLE OF EXHIBITS

Exhibit No.	*No. on Return All Part of #51*	*In Evidence and Explanation of Exhibit*
10*		
11		R. 63
12		R. 103-121
13		
14		
15	1	R. 147
16	4	R. 147-148
17	6	R. 148
18	7	R. 149
19	8	R. 149-150
20	9	R. 150-151
21	10	R. 151
23	13	R. 152
24	14	R. 152-154
28	18	R. 158-160
29	19	R. 161
30	20	R. 161
31	22	R. 162
32	23	R. 162
33	25	R. 162
34	27	R. 162

* Exhibits 10 to 14, inclusive, refer to the returns for 3514 Plyers Mill Road. The remaining exhibits refer to the return for 3700 Decatur Avenue. The returns are filed at A. 122 and A. 119 respectively.

Supreme Court, U. S.
FILED
FEB 14 1976
MICHAEL RODAK, JR., CLERK

No. 74-1646

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER C. ANDRESEN, PETITIONER

v.

STATE OF MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
ANDREW L. FREY,
Deputy Solicitor General,
STUART A. SMITH,
Assistant to the Solicitor General,
EDWARD R. KORMAN,
WYNETTE J. HEWETT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Question presented	1
Interest of the United States	2
Constitutional provisions involved	3
Statement	4
Summary of Argument	18
Argument:	
The privilege against being compelled to be a witness against oneself does not bar the admission into evidence of an individual's business records seized pursuant to a search warrant	23
A. Introduction	23
B. The search and seizure of petitioner's business records did not subject him to the testimonial compulsion prohibited by the Fifth Amendment	26
C. The self-incrimination clause was not intended to bar the seizure of documentary evidence pursuant to a valid search warrant	36
D. The values reflected by the privilege against self-incrimination are not impaired by the search and seizure of petitioner's business records	46
Conclusion	52

200-966—76——1

CITATIONS

Cases:

	Page
Abel v. *United States*, 362 U.S. 217	20, 34
Barnes v. *United States*, 412 U.S. 837	24
Bellis v. *United States*, 417 U.S. 85	26, 46, 49, 51
Benton v. *Maryland*, 395 U.S. 784	24
Berger v. *New York*, 388 U.S. 41	20, 32, 52
Boyd v. *United States*, 116 U.S. 616	19, 27, 29, 39
Cady v. *Dombrowski*, 413 U.S. 433	44
Couch v. *United States*, 409 U.S. 322	18, 27, 28, 44, 45, 46, 49
Cupp v. *Murphy*, 412 U.S. 291	44
Entick v. *Carrington*, 19 How. St. Trials 1029	21, 37, 38, 39
Gouled v. *United States*, 255 U.S. 298	19, 30, 33
Grosso v. *United States*, 309 U.S. 62	27
Hale v. *Henkel*, 201 U.S. 43	26
Harris v. *United States*, 331 U.S. 145	34
Hill v. *Philpott*, 445 F.2d 144, certiorari denied, 44 U.S. 991	21, 34, 42, 43, 44
Hoffa v. *United States*, 385 U.S. 293	20, 32
Horowitz, In re, 482 F. 2d 72, certiorari denied, 44 U.S. 867	28, 49
Johnson v. *United States*, 228 U.S. 457	45
Kastigar v. *United States*, 406 U.S. 441	22, 51
Katz v. *United States*, 389 U.S. 347	20, 33, 52
Koran v. *United States*, 469 F. 2d 1071	32
Maness v. *Meyers*, 419 U.S. 449	32
Marron v. *United States*, 275 U.S. 192	20, 34
Michigan v. *Tucker*, 417 U.S. 433	36
Miranda v. *Arizona*, 384 U.S. 436	26, 31
Murphy v. *Waterfront Commission*, 378 U.S. 52	46
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186	28

Cases—Continued

	Page
People v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108, certiorari denied, 384 U.S. 908	34, 35
People v. *Tucci*, 179 Colo. 373, 500 P. 2d 815	45
Romanelli v. *Commissioner*, 466 F. 2d 872	33
Schmerber v. *California*, 384 U.S. 757	19, 29, 30, 47
Shaffer v. *Wilson*, 523 F. 2d 175, petition for a writ of certiorari pending, No. 75–601	2, 45
Stanford v. *Texas*, 379 U.S. 476	21, 40
Stanley v. *Georgia*, 394 U.S. 557	41
Taylor v. *State of Minnesota*, 466 F. 2d 119, certiorari denied, 410 U.S. 956	45
Truitt v. *Lenahan*, C.A. 6, No. 75–1694, decided February 5, 1976	45
United States v. *Beck*, 511 F. 2d 997	45
United States v. *Bennett*, 409 F. 2d 88, certiorari denied *sub nom. Haywood* v. *United States*, 396 U.S. 852	45, 51
United States v. *Blank*, 459 F. 2d 383, certiorari denied, 409 U.S. 887	45
United States v. *Curreri*, 368 F. Supp. 757	45
132	46
United States v. *Dionisio*, 410 U.S. 1	19, 30
United States v. *Gargotto*, F. 2d 1009	45
United States v. *Iannelli*, 339 F. Supp. 171	45
United States v. *Lefkowitz*, 285 U.S. 452	20, 34
United States v. *Mara*, 410 U.S. 19	19, 30
United States v. *Muckenstrum*, 515 F. 2d 568	33
United States v. *Murray*, 492 F. 2d 178	45

Cases—Continued Page
United States v. *Nobles*, 422 U.S. 225---- 27
United States v. *Scharfman*, 448 F. 2d 1352, certiorari denied, 405 U.S. 919---- 45
United States v. *Wade*, 388 U.S. 218------ 19, 30
United States v. *Walk-In Vault, A*, 395 F. Supp. 833---------- 46
Vonder Ahe v. *Howland*, 508 F. 2d 364---- 45
Warden v. *Hayden*, 387 U.S. 294------ 20, 30, 39
Wilson v. *United States*, 221 U.S. 361----- 26
Constitution, statute and rules:
Constitution of the United States:
First Amendment---------- 23, 40
Fourth Amendment---------- *passim*
Fifth Amendment---------- *passim*
18 U.S.C. 3103a---------- 2, 3, 25
Federal Rules of Criminal Procedure:
Rule 41(b)(1)---------- 2, 3
Rule 41(b)(3)---------- 34
Miscellaneous:
Amedican Law Institute, *A Model Code of Pre-Arraignment Procedure*, Section SS 210.3 (Proposed Official Draft, April 15, 1975)---------- 25, 51
Chafee, *The Progress of the Law 1919–1922*, 35 Harv. L. Rev. 673 (1922)------ 31
Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968)---------- 27, 49
Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 Minn. L. Rev. 891 (1960)---------- 41
Levy, *Origins of the Fifth Amendment* (1968) ---------- 37, 40, 41
VIII Wigmore, *Evidence* § 2264 (McNaughton rev. 1961)---------- 28, 31, 43

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–1646

PETER C. ANDRESEN, PETITIONER

v.

STATE OF MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the following question:

Whether a person's privilege under the Fifth Amendment against being compelled to be a witness against himself can be invoked to bar the admission into evidence of his business records seized by law enforcement officers in compliance with the Fourth Amendment.

INTEREST OF THE UNITED STATES

This case presents an important question relating to the proper scope of the Fifth Amendment privilege against self-incrimination. There are a large number of federal prosecutions (*e.g.*, tax, securities, gambling and narcotics cases) in which the defendant's financial records or other papers constitute trustworthy evidence of criminal activity. Accordingly, the United States has a direct interest in the question whether the court below correctly held that the Fifth Amendment privilege cannot be invoked to bar the introduction into evidence of an individual's business records seized by law enforcement officers pursuant to an otherwise valid search warrant. The identical question is involved in *Shaffer* v. *Wilson,* 523 F. 2d 175 (C.A. 10), petition for a writ of certiorari pending, No. 75-601, in the context of the seizure by special agents of the Internal Revenue Service of the business records of an individual taxpayer pursuant to a search warrant issued upon a showing of probable cause to believe that the records would contain evidence that the taxpayer willfully evaded paying taxes.

Moreover, petitioner's claims of privilege implicitly call into question the validity of an Act of Congress (18 U.S.C. 3103a) that authorizes the issuance of a warrant "to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States," and of a similar provision promulgated by this Court in Rule 41(b)(1) of the Federal Rules of Criminal Procedure. The

enactment of 18 U.S.C. 3103a and the amendment of Rule 41(b)(1) followed this Court's decision in *Warden* v. *Hayden,* 387 U.S. 294, which expanded the scope of lawful searches and seizures beyond the categories of instrumentalities, fruits of a crime, or contraband. It is important that federal law enforcement officers know under what circumstances the exercise of their authority under these statutorily-defined standards will violate the constitutional rights of persons under investigation. Thus, the resolution of the question presented will have a significant impact upon a broad range of cases to which the United States is a party.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their pesons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

---

[1] We do not address petitioner's other claims (Br. 26–37) with respect to the validity of the search warrant because they are necessarily tied to the particular facts of the case and do not appear to present legal questions of broad significance to the United States. Thus, our position is that if the search and seizure complied with the requirements of the Fourth Amendment, the evidence seized was properly admitted at petitioner's trial.

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

1. Petitioner is an attorney specializing in real estate settlements in Montgomery County, Maryland. In early 1972, there was considerable public disclosure of various "kick-back" schemes, imposition of unnecessary charges on home buyers, and unethical relationships between lawyers, real estate brokers, title companies and developers in real estate settlements in the Washington, D.C. area. As a result, a Bi-County Fraud Unit, under the joint auspices of the State's Attorneys' Offices of Montgomery and Prince George's Counties, commenced an investigation into such practices (Pet. App. A. 1–2).

During the investigation, petitioner's activities as a real estate settlement attorney came under scrutiny. Two special investigators interviewed the purchaser, mortgage holder, and other lienholders with respect to a transaction involving Lot 13T in the Potomac Woods subdivision of Montgomery County. They also searched the land records of Montgomery County. The investigation revealed that petitioner, acting as a settlement attorney, had defrauded Standard-Young Associates, a home construction firm, by representing to it upon its purchase of Lot 13T that the property was free of liens and that no title insurance was necessary, when in fact he knew that there were two outstanding liens on the property. The investigation

further revealed that the lienholders subsequently threatened to foreclose their liens, forcing a halt to construction on the property. After Standard-Young confronted petitioner with these developments, petitioner, acting as agent of the Title Insurance Company of Minnesota, issued a title insurance policy to Standard-Young. The policy guaranteed that Standard-Young received a clear title to the property, and petitioner's issuance of such a policy thereby defrauded the insurance company by requiring it to pay the outstanding liens (Pet. App. A. 23–28, 37–38; A. 97–113, 116–118).

Because the facts relating to petitioner's activities with respect to Lot 13T indicated that there was probable cause to believe that he had committed the crime of false pretenses against Standard-Young, the special investigators set forth the facts they had discovered in sworn affidavits as the basis for applications for two search warrants (A. 97–113, 116–118). The applications sought permission to search petitioner's law offices and the offices of Mount Vernon Development Corporation [2] for specifically described documents "that directly pertain[ed] to the sale and conveyance of [Lot] 13T * * *" (A. 108). A judge of the Sixth Judicial Circuit of Montgomery County concluded that there was probable cause and issued the warrants (A. 94–96, 114–115).

---

[2] Petitioner was the sole shareholder, incorporator, resident agent, and director of Mount Vernon Development Corporation (A. 101). That entity was involved in some of the transactions at issue (see Pet. App. A. 25).

200-966—76——2

On October 31, 1972, the searches of the two offices were simultaneously carried out between the hours of 10:30 a.m. and 3:00 p.m. During the search of his law offices, petitioner was present and free to move about. In addition, petitioner's counsel was present during the latter half of the search (Supp. Tr. 168–170, 175).[3] The documents seized from petitioner's law offices represented approximately two to three percent of the files in that office (Supp. Tr. 176). The search of the office of Mount Vernon Development Corporation was carried out by a single special investigator in the presence of a police officer. They were admitted to that office by the manager of the building. This search took approximately four hours, and less than five percent of the corporate files were seized (Supp. Tr. 64–65, 75–76).

Prior to the execution of the search warrants, the Bi-County Fraud Unit had received complaints concerning petitioner's activities with respect to other lots in the Potomac Woods subdivision (Supp. Tr. 185–188). The gist of the complaints was that petitioner, as settlement attorney, took money from three sets of home purchasers upon assurances that he would deliver to them titles free and clear of all encumbrances, but that instead he misappropriated the purchase money to other purposes (Pet. App. A. 7). Specifically, petitioner had entered into an arrangement with the building contractor (Clark-King Construction Company) pursuant to which he would advance

[3] "Supp. Tr." refers to the transcript of the hearing on petitioner's motion to suppress.

$2,000 upon the sale of each lot to release the aliquot portion of the outstanding liens on each lot. It was expected that Clark-King would reimburse petitioner for his advances when its sales improved. However, petitioner never advanced any funds for release of the liens but instead transmitted the purchasers' payments to Clark-King. Thus, the purchasers did not receive clear titles to the properties as petitioner had promised them (Pet. App. A. 7–8).

The three complainants, each of whom had purchased homes using petitioner as the settlement attorney, were Richard Pollitt, Seth Warfield, and Robert Holtzclaw (Pet. App. A. 9–15). Pollitt purchased Lot 12S in the Potomac Woods subdivision. However, when he later attempted to sell his house, his attorney informed him that there was an outstanding lien on the property (Tr. 88–89, 102).[4] An attorney hired by Warfield also advised him that his property (Lot 25R) was encumbered with a lien (Tr. 112). Upon learning of petitioner's fraudulent misrepresentations from others in the community, Holtzclaw inquired of the State's Attorney's office, which informed him that his property (Lot 7T) was similarly encumbered (Tr. 152, 154–155).

2. Petitioner was subsequently charged by information and indictment with false pretenses, relating to his misrepresentation to Standard-Young Associates concerning Lot 13T, and with fraudulent misappropriation by a fiduciary, relating to the false claims to the three home buyers Pollitt, Warfield, and Holtz-

[4] "Tr." refers to the transcript of the trial proceedings.

claw (Pet. App. A. 1, 88).[5] Petitioner thereupon filed a motion to suppress the seized documents, and the trial court held a full suppression hearing (Pet App. A. 29). The items seized from the two offices were listed on the returns of the search warrants (A. 119–129). At the suppression hearing, a large number of the documents that had been seized pursuant to the warrant were returned by the State to petitioner. Of

[5] Originally, petitioner was charged by information with four counts of false pretenses relating to Lot 13T. He was also charged in an indictment containing 17 counts, the first 12 of which related to the purchases by Pollitt, Warfield and Holtzclaw. In connection with each purchase, petitioner was charged with larceny after trust of $100 or more, embezzlement, fraudulent misappropriation by a fiduciary, and false pretenses (Tr. 1035–1036). The last five counts in the indictment were false pretenses, forgery, uttering, failure to pay tax and recording charges, and misrepresentation of a taxable consideration (Supp. Tr. 393).

The charges in the information and indictment were consolidated for trial (Pet. App. A. 1). At the end of the trial, the State presented to the jury only the first two counts of false pretenses in the information and the first twelve counts in the indictment (Tr. 933–934). The jury found petitioner guilty on eight of the 16 counts which it considered: five counts of false pretenses and three counts of fraudulent misappropriation by a fiduciary (Tr. 1069; Pet. App. A. 2). The trial court sentenced petitioner to eight concurrent two-year terms (Pet. App. A. 2). The Court of Special Appeals of Maryland reversed petitioner's convictions on four of the five counts of false pretenses because a necessary element of the offense, the intent to defraud, had not been alleged (Pet. App. A. 19–22). Because those counts are no longer at issue, we have described the charges against petitioner relating to the Pollitt, Warfield, and Holtzclaw transactions only as misappropriation by a fiduciary.

the 52 items listed on the return as having been seized from the offices of Mount Vernon, the State returned approximately 45 items (Supp. Tr. 15, 98). The trial court suppressed six other items on the ground that there was no nexus between those items and petitioner's alleged criminal conduct. The only item seized from the corporation's offices that was not returned by the State or suppressed by the trial court was Item 51 on the return, a file captioned "Potomac Woods General" (A. 127, 143–144.)[6]

At trial, three documents from the corporate file captioned "Potomac Woods General" were admitted into evidence as State's Exhibits 1B–1D.[7] The documents were handwritten notes prepared by Carl Zentz, an employee of petitioner, in the course of his duties as a title searcher and law clerk (Pet. App. A. 46–47; Tr. 302, 309, 311). The three exhibits were notes with respect to deeds of trust affecting various lots in the Potomac Woods subdivision, from which Zentz had prepared abstracts (Tr. 311). These documents related to the transaction involving Lot 13T (Pet. App. A. 46–47), with respect to which the first count of the in-

[6] This item, a file folder, was identified at the suppression hearing by numbering the individual documents contained in the file as Defendant's Exhibits 10–14 (Supp. Tr. 102).

[7] Although the Court of Special Appeals stated that five documents from the corporate files were admitted into evidence (Pet. App. A. 46), it appears that only three such documents were admitted and that the two labeled as State's Exhibits 1A and 1E were not actually admitted (Tr. 315).

BEST COPY AVAILABLE

formation charged petitioner with false pretenses against Standard-Young Associates.[8]

Of the 29 items listed on the return as having been seized from petitioner's law office,[9] seven were returned by the State (Supp. Tr. 13) and four were suppressed by the trial court for lack of nexus with petitioner's alleged criminal conduct (Supp. Tr. 366). Approximately five of the remaining items were admitted into evidence (Pet. App. A. 47). The first of the items seized from petitioner's law offices, which was introduced at trial as State's Exhibit 2, was a folder captioned "Clark-King to Holtzclaw," relating to the conveyance of Lot 7T to Holtzclaw (Tr. 156–160). The second item was a file captioned "Antonelli to Mount Vernon to Young Contracting Company," which was identified as State's Exhibit 3 (Pet. App. A. 47; Tr. 64). This file contained five documents: settlement statements for the buyer and seller, a deed conveying the property to Young dated July 17, 1972, and an original and copy of a notice to the buyer regarding releases of liens (Tr. 484–485, 487, 493, 494, 507). Each of the documents directly related to the transaction involving Lot 13T (Pet. App. A. 47). The

[8] The documents established that petitioner's representation to Standard-Young Associates that Lot 13T was free of liens was false and that he knew it was false.

[9] A total of 28 rather than 29 items were actually seized from petitioner's law offices. Item Number 29 listed on the return (A. 121) identified the same file as Item Number 18 (A. 120; Supp. Tr. 13).

third item was a handwritten note from a file captioned "Clark-King to Antonelli," identified as State's Exhibit 4 (Tr. 64, 601–602). That file dealt exclusively with Lot 13T (Pet. App. A. 47). The fourth item was a copy of a deed of trust dated March 27, 1972, from Clark-King Construction Company to F. O. Day Company,[10] which was introduced as proof of petitioner's alleged failure to pay recording taxes (identified as State's Exhibit 10A) (Tr. 64, 606).[11] A certified copy of this document from the land records in Montgomery County was included in State's Exhibit 36 (Tr. 362, 616). The final item seized from petitioner's law offices included samples of his handwriting, which were introduced as State's Exhibit 20 (Tr. 66, 471–473).[12]

[10] The first deed of trust to F. O. Day Company encumbered the three lots which were the subject of the other charges against petitioner (Pet. App. A. 8).

[11] The charge of failure to pay recording taxes was abandoned by the State. See n. 14, *infra*.

[12] A handwriting expert testified that the samples were written by petitioner (Tr. 468–472). Although petitioner was willing to stipulate that the expert would testify that the documents were written by petitioner, he would only so stipulate on the condition that he could argue to the jury that someone else might have written them. As a result the trial court permitted the handwriting expert to testify (Tr. 465–466).

Two of the handwritten notes were introduced at trial for the purpose of proving that petitioner knowingly made misrepresentations with respect to Lot 13T, as charged in Count 1 of the information (Pet. App. A. 24–27). In one of the notes in petitioner's handwriting, attached to the file marked "Clark-King to Anton-

3. The bulk of the evidence admitted at trial, State's Exhibits 21 through 67, was not seized from petitioner's corporate or law offices,[13] but was produced from the records of the complaining purchasers, lienholders, the title insurance company, and the public land records of Montgomery County. For example, with respect to the transaction involving Lot 7T, purchased by Holtzclaw, State's Exhibit 29 consisted of the contract of purchase, Holtzclaw's settlement statement and title insurance policy, and other documents given by him to the prosecution (Tr. 131–132). From the business records of Enterprise Federal Savings and Loan Association, the mortgagee, a title insurance binder, loan application and other papers were introduced as State's Exhibit 32 (Tr.

elli" and identified as part of State's Exhibit 20D at trial, he directed his employee to set up a "deferred card" so as to delay the release of the liens on Lot 13T (Pet. App. A. 24). The other document in petitioner's handwriting was a draft of the purchase contract for Lot 13T, which recited that the property was "free of encumbrance[s]" except as otherwise specified in the contract (Pet. App. A. 25).

[13] The origin and status of State's Exhibits 1–20 was as follows: State's Exhibits 1 (Records of Mount Vernon Development Corporation) and 2 (records from petitioner's law offices) were seized and admitted into evidence. State's Exhibits 3–16, containing items which were seized from petitioner's law offices, were marked (Tr. 64) for introduction into evidence. However, only State's Exhibits 3, 4, and 10A were admitted into evidence. State's Exhibits 17 and 18 were corporate records which petitioner produced pursuant to a subpoena. State's Exhibit 19 was an analysis of the items contained in the handwriting file prepared by the handwriting expert. State's Exhibit 20 contained several documents seized from petitioner's law offices upon which petitioner's handwriting appeared, together with papers containing known handwriting samples of petitioner and an analysis of the handwriting expert.

225–227). These items established that Holtzclaw had purchased Lot 7T with the understanding from petitioner that it would be free of encumbrances. From Montgomery County land records came copies of the deed, releases of liens and other documents that were introduced as State's Exhibit 34 (Tr. 270–287). Copies of documents concerning Lot 7T, obtained from the business records of Title Insurance Company of Minnesota, were admited as State's Exhibit 57 (Tr. 709–710). All of this evidence was admitted without objection. (Tr. 131–132, 226–227, 287, 710). In addition, the business records of three lienholders, F. O. Day Company (State's Exhibit 37), State National Bank of Bethesda (State's Exhibit 62), and Madison National Bank (State's Exhibit 50), were admitted into evidence (Tr. 346–347, 794, 632). These items established that petitioner did not arrange for the release of the three outstanding liens upon Lot 7T, and thus failed to deliver to Holtzclaw a free and clear title pursuant to his promise, as charged in Count 11 of the indictment (see Pet. App. A. 13–15).

Likewise, with respect to the fraudulent misappropriation charge concerning Lot 12S, purchased by Pollitt, none of the evidence was obtained as a result of the search and seizure of documents from petitioner's law offices. Documents from Pollitt's own records, including his settlement sheet and a waiver of the right to receive notice of the release of liens, were introduced and established that Pollitt purchased Lot 12S with the understanding from peti-

200-966—76——3

tioner that aside from the purchase money mortgage he executed, the lot was free of encumbrances (see, for example, State's Exhibits 21, 22, 24, 25) (Tr. 77–84). In addition the mortgagee's records and certified copies of documents from the Montgomery County land records were introduced into evidence (State's Exhibits 23, 34; Tr. 171, 271–272, 287), as were the records of the lienholder (State's Exhibit 37; Tr. 346–348). This evidence established that petitioner did not fulfill his express obligation to Clark-King to extinguish the liens and deliver the clear title he promised to Pollitt, as charged in Count 3 of the indictment (Pet. App. A. 9–11).

Finally, the same type of evidence was obtained with respect to Lot 25R, which was purchased by Warfield. Warfield's records (State's Exhibit 27; Tr. 107–109) and the records of the mortgagee (State's Exhibit 28; Tr. 164) established that Warfield had taken the property with the understanding from petitioner that the lot was unencumbered by prior deeds of trust. The records of the lienholder (State's Exhibit 37) established that petitioner did not extinguish the encumbrance and thereby failed to deliver the clear title he promised to Warfield, as charged in Count 7 of the indictment (Pet. App. A. 11–13). In other words, this count was proved entirely by evidence from sources other than the records seized from petitioner's law offices.

4. To summarize the status of the documents, the State returned to petitioner approximately 45 items seized from the Mount Vernon Development Corporation and seven items seized from petitioner's law offices (Supp. Tr. 13, 15, 98; A. 139). The trial court granted petitioner's motion to suppress with respect to six items seized from the corporation and four items seized from petitioner's law offices on the ground that they were unconnected with the charges against him. The trial court denied petitioner's motion to suppress with respect to the one remaining item seized from the corporation and 17 items seized from petitioner's law offices (A. 139, 143–144). However, the State at trial only introduced into evidence one exhibit containing corporate records and five exhibits containing documents seized from petitioner's law offices (Pet. App. A. 46–47).

In denying the suppression motion, the trial court held (A. 136–144) that the introduction into evidence of the items seized did not violate either the Fourth or Fifth Amendment. With respect to petitioner's Fourth Amendment claim, the trial court concluded that the warrants were supported by probable cause, that the evidence seized was not stale, that most of the seized documents related directly to Lot 13T and were within the scope of the search warrants, and that the items which did not directly relate to Lot 13T were admissible as evidence that would establish a pattern of criminal conduct with respect to Lot 13T.[14] With respect to petitioner's Fifth Amendment claim, the

[14] The trial court's discussion of State's Exhibit 10A (A. 142–143) is no longer germane because it related to the charge of failure to pay recording taxes, which was abandoned by the State before the case went to the jury.

trial court held that the search and seizure did not force petitioner to be a witness against himself because he was not compelled to produce or authenticate the seized documents (A. 142).

At trial, the State presented the testimony of all of the parties defrauded by petitioner. Thus, George Young of Standard-Young testified concerning his purchase of Lot 13T as follows: that he paid a fee to petitioner at settlement; that at the time of settlement petitioner assured him that title insurance was not necessary because the title was good; that after the bank threatened to foreclose on one of the unknown liens, he confronted petitioner, who did not deny that the property was encumbered; that petitioner thereafter issued a title insurance policy guaranteeing a clear title; and that construction on Lot 13T was interrupted for several months (Tr. 473–531). Richard Pollit testified (Tr. 76–106) that he paid petitioner a fee at settlement, that he understood that he would be receiving clear title, and that he subsequently learned that Lot 12S was encumbered. Seth Warfield (Tr. 106–130) and Robert Holtzclaw (Tr. 130–162) testified to the same effect with respect to their purchases of Lots 25R and 7T, respectively.

Moreover, the State presented the testimony of the lienholders. For example, Peter Hitchen of the F.O. Day Company testified that he confronted petitioner after petitioner's failure to discharge the liens was discovered. Hitchen related that he told petitioner, "[i]t looks to me as though you've been playing the

old escrow game," but that petitioner said nothing (Tr. 351). Finally, Carl Zentz, petitioner's law clerk, testified (Tr. 309, 311–313) that he wrote notes for the purpose of preparing abstracts for petitioner, which notes set forth the fact that there were undischarged liens on the properties that petitioner later guaranteed were free of encumbrances. Petitioner's secretary, June Stup, testified that on one occasion she questioned petitioner as to the correctness of a draft deed prepared by him that stated that it was free of encumbrances except as otherwise specified, but that petitioner directed her to type the deed as he had prepared it (Tr. 592–595).

The jury found petitioner guilty on eight of the sixteen counts that it considered: five counts of false pretenses and three counts of fraudulent misappropriation by a fiduciary (Tr. 1069; Pet. App. A. 2). The trial court sentenced petitioner to eight concurrent two-year prison terms (Pet. App. A. 2).

5. The Court of Special Appeals of Maryland affirmed the trial court's judgment with respect to petitioner's Fourth and Fifth Amendment claims (Pet. App. A. 28–54).[15] It held (A. 33–35) that the search

[15] The Court of Special Appeals reversed petitioner's convictions on four of the five counts of false pretenses, relating to the Pollitt, Warfield, and Holtzclaw transactions, because a necessary element of the offense, the intent to defraud, had not been alleged in the indictment (Pet. App. A. 19–22). Hence, as the case comes to this Court, petitioner seeks reversal of his convictions on one count of false pretenses relating to Lot 13T and three counts of misappropriation of funds by a fiduciary relating to the Pollitt, Warfield, and Holtzclaw transactions, for which he received four concurrent two-year prison terms.

warrants did not authorize a general search in violation of the Fourth Amendment and that the phrase in the warrants—"together with other fruits, instrumentalities and evidence of crime at this time unknown"—must be read in light of the remaining parts of the search warrant to authorize only the seizure of those items which might show the crime of false pretenses with respect to petitioner's sale of Lot 13T. The court further held that the warrants were supported by probable cause to believe that a crime had been committed and that the seized items that were ultimately introduced at trial were within the scope of the warrants (Pet. App. A. 36–49). In addition, the court agreed with the trial court that the search did not abridge petitioner's Fifth Amendment privilege against being compelled to be a witness against himself because he was not compelled to do anything (Pet. App. A. 49–54).

SUMMARY OF ARGUMENT

1. The Fifth Amendment prohibition against compelling a person to be a witness against himself is a personal privilege that "adheres basically to the person, not to information that may incriminate him." *Couch* v. *United States,* 409 U.S. 322, 328. In order to activate the privilege, certain critical elements must conjoin: there must (1) be compulsion on the individual (2) to require testimony or acts of a testimonial character (3) exposes the individual to potential criminal liability. The privilege is not transgressed simply by virtue of the fact that the accused is made

the source of incriminating evidence, so long as the evidence is not secured by means of testimonial compulsion. See *United States* v. *Mara,* 410 U.S. 19, 21–22 (compelled creation of handwriting exemplars); *United States* v. *Dionisio,* 410 U.S. 1, 5–7 (voice exemplars); *United States* v. *Wade,* 388 U.S. 218 (compelled utterance of words in identification line-up); *Schmerber* v. *California,* 384 U.S. 757 (unconsented blood sample).

It is true that, under the holding in *Boyd* v. *United States,* 116 U.S. 616, the privilege is available to excuse compliance with a subpoena for the production of personal books and papers in the possession of the individual claiming the privilege. But it is clear from later decisions of this Court such as *Couch* that the privilege is available in such circumstances because the act of production constitutes an authentication of the fact that the papers produced are those called for by the subpoena. Unlike a subpoena, a search and seizure does not require the individual to aid in the discovery, production, or authentication of incriminating evidence; it thus does not fall within the rationale for application of the privilege that underlies contemporary applications of the *Boyd* holding.

The fact that the objects involved in an otherwise lawful search and seizure are private papers rather than other kinds of evidence does not alter the analysis. As this Court long ago stated in *Gouled* v. *United States,* 255 U.S. 298, 309: "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seiz-

ure * * *." Seizures of incriminating papers were consistently upheld in such cases as *Marron* v. *United States,* 275 U.S. 192; *United States* v. *Lefkowitz,* 285 U.S. 452, 465–466; *Abel* v. *United States,* 362 U.S. 217, 238, subject only to the then-prevailing requirement that the papers constitute instrumentalities of crime rather than "mere evidence." The overruling of the immunity of "mere evidence" from seizure in *Warden* v. *Hayden,* 387 U.S. 294, coupled with *Gouled's* observation that papers enjoy no special status, effectively disposes of the issue in this case.

We recognize that the Court stated in *Hayden* that it was not there deciding the question, but we think it is clear from cases decided contemporaneously with *Hayden* that the seizure of evidence of a "communicative" character, while closely scrutinized for compliance with the procedural requirements of the Fourth Amendment, does not implicate Fifth Amendment concerns. Thus, the Court in *Hoffa* v. *United States,* 385 U.S. 293, rejected the defendant's contention that the testimony of a government informant about his conversations with the defendant violated the defendant's Fifth Amendment privilege, since he had not been compelled to speak to the informant. So, here, petitioner was in no way compelled to create the papers that were seized. This conclusion is further bolstered by cases such as *Berger* v. *New York,* 388 U.S. 41, and *Katz* v. *United States,* 389 U.S. 347, in which the Court recognized that private conversations have no absolute immunity from seizure. If that is true, it follows *a fortiori* that the kind of documents seized from petitioner can enjoy no such immunity.

2. The seizure of business records pursuant to a valid search warrant is an action far removed from the evils that promoted the development of the "right to silence" in England and the adoption of a constitutional provision in the United States protecting individuals from being forced to bear witness against themselves in criminal proceedings. The dictum in *Boyd* equating a search and seizure with a subpoena for Fifth Amendment purposes appears to be based upon a dictum in *Entick* v. *Carrington,* 19 How. St. Trials 1029, that has otherwise had no continuing vitality in either English or American law. The enduring significance of *Entick* has been in its condemnation of general warrants, a view embodied in the warrant clause of the Fourth Amendment. As *Stanford* v. *Texas,* 379 U.S. 476, confirms, the protection of private papers from unjustified official scrutiny is the mission of the Fourth Amendment, perhaps reinforced in special cases by First Amendment policies of free expression, but it is far removed from the policies that inform the Fifth Amendment testimonial privilege.

The weight of appellate authority among courts that have considered this question is contrary to petitioner's position. The major case espousing his view is *Hill* v. *Philpott,* 445 F. 2d 144 (C.A. 7), which concluded that personal books and records should be immune from seizure because they "speak against [a defendant] as clearly as his own voice" (*id.* at 149).

200-966—76——4

But other kinds of tangible evidence, although not documentary in nature, can, and often do, "speak" against a defendant in the same fashion, *i.e.*, by evidencing his criminal activities. Thus, the logical but surely unacceptable result of the Seventh Circuit's decision in *Hill* is to exclude from evidentiary use on Fifth Amendment grounds all evidence of guilt seized from a defendant.

3. Finally, the invalidity of petitioner's claim may readily be perceived when it is evaluated against the policies that may reasonably be suggested to underlie the Fifth Amendment privilege. Of the policies catalogued in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55, none has even arguable application here except for the suggested objective to preserve a "private enclave" for the individual, free from any kind of governmental scrutiny. But this Court has never sustained a Fifth Amendment claim predicated solely or even primarily on privacy interests, and any such ruling would be, we think, wholly inconsistent with the principles of *Gouled, Schmerber, Katz,* and similar cases. Indeed, if privacy were a sufficient basis for application of the privilege, the long-standing practice of compelling testimony from immunized witnesses, which was recognized by this Court in *Kastigar* v. *United States,* 406 U.S. 441, could hardly be sustained.

ARGUMENT

THE PRIVILEGE AGAINST BEING COMPELLED TO BE A WITNESS AGAINST ONESELF DOES NOT BAR THE ADMISSION INTO EVIDENCE OF AN INDIVIDUAL'S BUSINESS RECORDS SEIZED PURSUANT TO A SEARCH WARRANT

A. INTRODUCTION

This brief is addressed generally to the broad question whether an individual's papers are immune, by virtue of the self-incrimination provision of the Fifth Amendment, from a search and seizure conducted in compliance with the procedural requirements of the Fourth Amendment. We contend that the Fifth Amendment privilege confers no such immunity and that the lawfulness of such searches and seizures are in all instances to be assessed on the basis of the Fourth Amendment (possibly influenced in a narrow category of special cases by First Amendment considerations).

This is not a case in which the papers seized are of an intimately personal nature, such as a diary or a personal letter to a family member or friend. Although we believe that the self-incrimination provision confers no immunity from search and seizure even in such instances, the papers that were seized in this case are of a character far removed from that kind of inti-

mately personal document. They were simply commonplace business records and other documents reflecting various fraudulent real estate transactions perpetrated by petitioner (Pet. App. A. 46–47).[16] As the court below observed, almost all of the papers seized from petitioner were impersonal items such as "deeds of easements, declaration of covenants, abstract reports, deeds of trust and title binders" (Pet. App. A. 46).[17] What emerges, therefore, from an examination of the documents seized and admitted into evidence, is that they were not "personal diaries, letters, or other writings or recordings, made solely for private use or communication to an individual occupying a family,

[16] For the convenience of the Court, we are filing a separate Appendix of Exhibits reproducing copies of all the documents seized pursuant to the search warrants that were admitted into evidence at trial. These documents fall into two categories: (1) State's Exhibits 1B–1D, which were seized from the office of Mount Vernon Development Corporation; and (2) State's Exhibits 2, 3, 4, 10A and 20, which were seized from petitioner's law offices.

[17] Indeed, an analysis of the business records seized suggests that the Court could apply the discretionary concurrent sentence doctrine of *Benton* v. *Maryland*, 395 U.S. 784, 791, and decline to consider petitioner's Fifth Amendment claim. See *Barnes* v. *United States*, 412 U.S. 837, 848 and n. 16.

As the case comes to this Court, petitioner seeks review of his convictions on one count of false pretenses, relating to his misrepresentation concerning Lot 13T to Standard-Young Associates, and on three counts of misappropriation by a fiduciary, relating to his failure to deliver clear titles to Richard Pollitt, Seth Warfield, and Robert Holtzclaw, in connection with the purchase of their homes. The trial court sentenced petitioner to concurrent two-year terms on each of these four counts.

Because the documents seized from Mount Vernon Development Corporation are not eligible for the privilege against self-incrimination (see n. 19, *infra*), petitioner's Fifth Amendment claim is arguably applicable only with respect to the five items

personal or other confidential relation[ship]" (American Law Institute, *A Model Code of Pre-Arraignment Procedure,* Section SS 210.3 (Proposed Official Draft, April 15, 1975)).[18] Thus this case does not implicate the special concerns that might arise in cases of seizures of more intimately personal papers.[19]

seized from his law offices. But those items (State's Exhibits 2, 3, 4, 10A, and 20) related only to the Standard-Young transactions and the Holtzclaw purchase. (In fact, State Exhibit 10A related to the charge of failure to pay recording taxes which was dropped by the State prior to the submission of the case to the jury (see nn. 11, 14, *supra*)).

However, as the Statement points out (*supra*, pp. 12–14), the evidence necessary to convict petitioner on the two counts of misappropriation by a fiduciary with respect to the Pollitt and Warfield transactions (for which he was sentenced to concurrent two-year terms) was not obtained from the search and seizure of petitioner's records but came from independent sources. It may therefore be appropriate for the Court to exercise its discretion under the concurrent sentence doctrine and decline to consider petitioner's constitutional claims.

[18] The Note to this portion of Section SS 210.3 of the American Law Institute's Proposed Official Draft *Code of Pre-Arraignment Procedure* states that it "carves out a limited area of immunity from seizure for private documents, such as diaries, that have played no part in any criminal enterprise." The scope of the exception, which embodies a statutory policy rather than a constitutional right, is therefore coextensive with 18 U.S.C. 3103a, which authorizes the seizure of "property that constitutes evidence of a criminal offense in violation of the laws of the United States."

[19] Moreover, contrary to petitioner's assertion (Br. 19) that the seizure "amounted to literally thousands of papers," the fact is that his Fifth Amendment claim is at best limited to the very small number of the seized documents that were actually admitted into evidence at trial. Petitioner makes no claim that the authorities

B. THE SEARCH AND SEIZURE OF PETITIONER'S BUSINESS RECORDS DID NOT SUBJECT HIM TO THE TESTIMONIAL COMPULSION PROHIBITED BY THE FIFTH AMENDMENT

1. The Fifth Amendment privilege provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself * * *." This constitutional prohibition "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona,* 384 U.S. 436, 460. Since the privilege is a personal privilege

developed any leads from the papers seized that were not introduced into evidence.

Of the 29 items seized from petitioner's law offices, seven were returned by the State and four were suppressed by the trial court as irrelevant to the charges. However, the State chose to introduce only five exhibits into evidence. These exhibits (State's Exhibits 2, 3, 4, 10A, and 20) consisted of various impersonal legal documents such as title insurance binders, deeds of trust, and contracts of sale, which petitioner used in connection with his criminal activities.

Finally, only one of the 52 items seized from the office of Mount Vernon Development Corporation, consisting of notes made by petitioner's employee for the purpose of preparing title abstracts, was admitted in evidence as State's Exhibits 1B–1D. However, it is well established that the privilege against self-incrimination could not be invoked with respect to such corporate records. See, *e.g.*, *Hale* v. *Henkel*, 201 U.S. 43; *Wilson* v. *United States*, 221 U.S. 361; *Bellis* v. *United States*, 417 U.S. 85, 88–89. Of the remaining 51 items seized from Mount Vernon, the State returned 45 items prior to the suppression hearing and the trial court suppressed six items as irrelevant to the charges against petitioner.

which "adheres basically to the person, not to information that may incriminate him" (*Couch* v. *United States,* 409 U.S. 322, 328), the element of personal compulsion upon the accused is critical to a claim under the Fifth Amendment. Thus, while the Constitution proscribes forcing a person to participate actively in the establishment of his guilt by condemning himself through his own testimony, it does not foreclose the use of statements elicited from another. In those circumstances, there is no personal compulsion imposed upon the accused. *United States* v. *Nobles,* 422 U.S. 225, 233–234.

Although the Fifth Amendment privilege was arguably intended to do no more than confer a testimonial privilege upon a witness in a judicial proceeding, this Court in *Boyd* v. *United States,* 116 U.S. 616, held that a person could not be compelled to obey a subpoena requiring the production of private documents in his possession that might tend to incriminate him.[20]

While the privilege has thus been extended to encompass documentary evidence as well as testimony, the Court has subsequently made clear that the ground of its decision in *Boyd* was that compliance

[20] This result has been criticized in Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 701–703 (1968). The author argues that the production of documents, as contrasted with oral testimony, ought not to be protected by the privilege against self-incrimination. See also *Grosso* v. *United States*, 390 U.S. 62, 76–77 (Stewart, J., concurring).

with a subpoena to produce private papers involves testimonial compulsion.[21] When a person is called upon to produce his private papers, "still there is a testimonial disclosure implicit in their production. It is the witness' assurance, compelled as an incident of the process, that the articles produced are the ones demanded." VIII Wigmore, *Evidence* § 2264, p. 380 (McNaughton rev. 1961). Thus, a person's very act of compliance with a subpoena for his private papers would acknowledge that the items produced were in fact his private papers and would thereby constitute an implicit authentication of them. As the Court reaffirmed in *Couch* v. *United States, supra,* 409 U.S. at 330–331, "[i]n *Boyd,* the production order was directed against the owner of the property who, by responding, would have been forced 'to produce and authenticate any personal documents or effects that might incriminate him.' *United States* v. *White,* 322 U.S., at 698." Where, as here, the evidence is obtained by search and seizure rather than by subpoena, the element of compulsory authentication, essential to a claim of the privilege in the context of documents, is absent.

We submit that the self-incrimination provision of the Fifth Amendment, whatever may be its impact in the case of a subpoena, does not bar the seizure of an individual's private papers, no matter what their

[21] The dictum in *Boyd* that a subpoena is equivalent to an unreasonable search and seizure under the Fourth Amendment, which evoked the disagreement of two Justices in *Boyd* itself, was implicitly rejected in *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 195–196. For a comprehensive discussion of the contemporary applicability of the Fourth Amendment to subpoenas, see *In re Horowitz,* 482 F.2d 72, 75–79 (C.A. 2) (Friendly, J.), certiorari denied, 414 U.S. 867.

character, assuming a valid search and seizure under the Fourth Amendment. We recognize that there is dictum in *Boyd* (116 U.S. at 633) that broadly suggests that "the seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself." But just as two Justices refused in *Boyd* to subscribe to the dictum equating a search and seizure with the subpoena actually involved in that case (116 U.S. at 638–641), the Court's subsequent emphasis upon the ingredient of testimonial compulsion as a prerequisite to a self-incrimination claim wholly undermines the assumption embodied in the *Boyd* dictum.[22]

When the element of testimonial compulsion is lacking, the recent decisions of this Court demonstrate that the privilege is unavailable to bar the introduction of evidence even though the source of the evidence is the accused himself. Thus, for example, in *Schmerber* v. *California,* 384 U.S. 757, the Court held that the unconsented taking of a blood sample from a person under arrest, for the purpose of conducting a chemical analysis of its alcoholic content, was not

[22] As we indicate below (*infra*, pp. 37–40), the dictum in *Boyd* was not premised on the "testimonial" or "communicative" nature of the evidence but on the now-rejected theory that the mere seizure of evidence (of any kind) compelled a defendant to bear witness against himself. As we there point out, the history of the self-incrimination clause demonstrates that, at the time of the adoption of the Constitution, the English common law right of silence was not viewed in the United States as according any special protection against the search and seizure of an individual's private papers as opposed to other objects of evidential value.

barred by the privilege. Although such evidence may serve to incriminate the accused, the Court stated that "[t]he distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it" (384 U.S. at 764). Since admission of the blood test evidence did not involve "even a shadow of testimonial compulsion upon or enforced communication by the accused" (*id.* at 765), it was not barred by the privilege against self-incrimination. Similarly, in *Warden* v. *Hayden,* 387 U.S. 294, 302–303, the Court rejected the "mere evidence" rule of *Gouled* v. *United States,* 255 U.S. 298, which had prohibited police searches for "mere evidence" (as opposed to instrumentalities of a crime or contraband) and held that the seizure of items of clothing from an accused person did not compel him to become a witness against himself. See also *United States* v. *Wade,* 388 U.S. 218 (compelled utterance of words in an identification lineup); *United States* v. *Dionisio,* 410 U.S. 1, 5–7 (voice exemplars); *United States* v. *Mara,* 410 U.S. 19, 21–22 (handwriting exemplars).

In our view, the foregoing principles require rejection of petitioner's claim that the search and seizure of his business records violated his privilege against self-incrimination. Unlike the subpoena in *Boyd,* which required that the accused produce and thereby authenticate his private papers for use against himself in a criminal proceeding, the search and seizure in this case involved no disclosure, production, or

authentication by petitioner. Rather, production was effected by law enforcement officers and the authentication of petitioner's records was made by a handwriting expert (Tr. 468–473). See generally VIII Wigmore, *Evidence* § 2264 (McNaughton rev. 1961). As Professor Chafee pointed out, the privilege is not violated by a search and seizure because the person is not compelled to do something active. Chafee, *The Progress of the Law, 1919–1922,* 35 Harv. L. Rev. 673, 697–698 (1922). This observation is pertinent here, where the search and seizure was pursuant to a warrant issued by a court and was carried out in a reasonable manner and without petitioner's participation.

In short, in this case the State produced the evidence against petitioner "by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona, supra,* 384 U.S. at 460. With respect to a search and seizure of business records, even more than with respect to the unconsented taking of a blood sample, the accused's "participation * * * [is] irrelevant." *Schmerber* v. *California, supra,* 384 U.S. at 765.

Thus, petitioner gains nothing by arguing (Br. 13) that the production of the papers could not have been compelled by subpoena. The availability of the privilege in resisting a subpoena is simply irrelevant to the question whether the seizure of these documents pursuant to a warrant compelled petitioner to be a witness against himself, since in this case he was

forced neither to produce nor to authenticate the documents. Indeed, petitioner's argument proves too much—if the lawful seizure of any item were precluded by virtue of the fact that a self-incrimination claim could be interposed in resistance to a subpoena, then the self-incrimination provision would threaten to render most searches illegal, since, under the logic of the authentication rationale, the government aguably could no more compel such an individual by subpoena to produce knives, bloodstained clothes, or other items of tangible personal property in his possession (cf. *Maness* v. *Meyers,* 419 U.S. 449, 461) than it could compel the production of books and records.

2. It was unnecessary, as the Court said, for it to decide in *Hayden* "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure" (387 U.S. at 303).

However, earlier in the Term in which *Hayden* was decided, the Court in *Hoffa* v. *United States,* 385 U.S. 293, had rejected the contention that the testimony of an informant about his conversations with the defendant violated the defendant's privilege, noting that the defendant had not been compelled to make the statements. Cf. *Koran* v. *United States,* 469 F. 2d 1071, 1072 (C.A. 5). And in *Berger* v. *New York,* 388 U.S. 41, which involved the collection of evidence by means of eavesdropping on private conversations, the Court summarily dismissed in a footnote the defendant's "mere evidence" argument that his privilege against self-incrimination was invaded. See 388 U.S. at 44 n. 2; see also *id.* at 97

n. 4 (Harlan, J., dissenting). Finally, in *Katz* v. *United States,* 389 U.S. 347, 354, the Court made clear that private conversations may validly be seized pursuant to a warrant complying with the requirements of the Fourth Amendment.

If the seizure of an individual's private conversations, which necessarily involves a substantial invasion of personal privacy, does not violate the Fifth Amendment, there can hardly be an absolute prohibition against the seizure of private papers. There is no basis for holding that although an oral conversation may be seized, a written transcript or tape recording of that conversation may not. In each instance, the testimonial compulsion necessary to a claim under the privilege against self-incrimination is lacking.

Apart from the *Boyd* dictum, this Court has never held that the seizure of an individual's private papers would violate his privilege against compulsory self-incrimination. Indeed, quite the contrary proposition was adopted by the Court in the line of cases beginning with *Gouled* v. *United States,* 255 U.S. 298, which applied the now discarded "mere evidence" rule but held that instrumentalities of crime could be seized pursuant to a proper warrant. As the Court stated in *Gouled* (255 U.S. at 309): "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." See also *Romanelli* v. *Commissioner,* 466 F. 2d 872, 877 n. 9 (C.A. 7); *United States* v. *Muckenstrum,* 515 F.2d 568 (C.A. 5).

After *Gouled,* this Court repeatedly affirmed that private papers of an individual may be seized and introduced into evidence if the papers were used in a criminal operation. See *Marron* v. *United States,* 275 U.S. 192 (records of an illegal business subject to seizure); *United States* v. *Lefkowitz,* 285 U.S. 452, 465–466 (same); *Abel* v. *United States,* 362 U.S. 217, 238 (false identity papers subject to seizure as instrumentalities of crime of espionage); cf. *Harris* v. *United States,* 331 U.S. 145, 150–155 (stolen papers subject to seizure). See also Rule 41(b)(3), Fed. R. Crim. P.; *People* v. *Thayer,* 63 Cal. 2d 635, 408 P. 2d 108, certiorari denied, 384 U.S. 908 (papers of physician engaged in false billing subject to seizure).

To the extent that the *Boyd* dictum suggested that the paper there in question could not validly have been seized any more than it could be subpoenaed, that was probably an accurate statement of the law as it was prior to *Hayden.* But as the foregoing decisions under the "mere evidence" rule make clear, the *Boyd* dictum was accurate not because the case involved a private paper but because the particular paper was "mere evidence" and not an instrumentality or fruit of crime. In the instant case, arguably, the papers siezed from petitioner's offices were in fact instrumentalities of his crimes of false pretenses and misappropriation, and thus subject to seizure under the *Marron-Lefkowitz-Abel* line of cases. See *Hill* v. *Philpott,* 445 F. 2d 144, 150 (C.A. 7) (Fairchild, J., dissenting), certiorari denied, 404 U.S. 991. However, we

need no longer concern ourselves with the subtle definitional problems posed by the distinction between "instrumentalities" and "mere evidence," because that distinction was abolished in *Warden* v. *Hayden, supra.*

The decisions of this Court involving seizures of papers that were deemed instrumentalities of crime cast their analyses in terms of the Fourth Amendment. We submit, however, that with respect to private papers the preservation of the mere-evidence/instrumentalities distinction is, if anything, even less sound when viewed from the perspective of the self-incrimination provision than when analyzed in Fourth Amendment terms. The focus of the Fifth Amendment privilege is, after all, incrimination, and the seizure of private papers employed as instrumentalities of crime is surely more incriminating than the seizure of comparable papers for mere evidentiary use. (The seizure of both types of papers, of course, involves exactly the same degree of compulsion.)

Thus, the abolition of the "mere evidence" rule has a further important consequence for this case. For if petitioner's Fifth Amendment claim is upheld, seizures of the type involved in *Marron* and similar cases would become invalid, so that records of gambling and narcotics transactions, if seized from the accused, could no longer be introduced in evidence. To put it another way, since incriminating documentary material has long been subject to search and seizure under the prior "instrumentalities" rule of the Fourth Amendment, it would be anomalous to uphold

petitioner's Fifth Amendment claim after the abolition in *Hayden* of that more restrictive rule simply because the evidence seized took the form of papers. We therefore submit that the Fifth Amendment offers no protection against the seizure of the documents taken from petitioner's offices in this case. We turn now to a discussion of the history of the privilege, which demonstrates that the Fifth Amendment was never intended to bar the seizure of documents pursuant to a properly particularized search warrant.

C. THE SELF-INCRIMINATION CLAUSE WAS NOT INTENDED TO BAR THE SEIZURE OF DOCUMENTARY EVIDENCE PURSUANT TO A VALID SEARCH WARRANT

1. As the Court recently observed in *Michigan* v. *Tucker*, 417 U.S. 433, 439–440, in construing the scope of the privilege against compulsory self-incrimination, "we must continue to hark back to the historical origins of the privilege, particularly the evils at which it was to strike." The Court there reviewed those historical origins, stating (*id.* at 440):

> The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. See L. Levy, Origins of the Fifth Amendment (1968); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. (1949); 8 Wigmore § 2250. Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the

> Framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination "was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."

Manifestly, the seizure of business records pursuant to a valid search warrant is far removed from the common law origins of the privilege. Although it was recognized in England that a person could not be compelled to produce incriminating documents pursuant to a subpoena, yet by the mid-eighteenth century "it was an open question whether the government, though unable to subpoena such evidence, might lawfully seize it by a search warrant and introduce it at the trial against the accused." Levy, *Origins of the Fifth Amendment* 390 (1968).

It is true that "the right of silence" had been extended in England by the 1760's "to prevent the use of general warrants to seize private papers in seditious libel cases" (*ibid.*), but it was never held to prohibit all searches for documentary materials. The leading case, frequently miscited for the broader proposition that the right of silence immunizes all documentary evidence from seizure, even pursuant to a lawfully authorized and particularized warrant, is *Entick* v. *Carrington*, 19 How. St. Trials 1029. There, the Secretary of State, seeking evidence of seditious libel, issued a warrant that commanded his messengers to seize John Entick "and to bring him with his papers to be examined before the secretary of state" (*id.* at

1063–1064). The court stated that the issuance of the warrant required that "the house must be searched; the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer" (*id.* at 1064).

In writing for the court in *Entick* v. *Carrington,* Lord Camden stated that the issue was whether "the secret cabinets and bureaus of every subject in this Kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel" (*id.* at 1063). Although he was not persuaded that "such a power can be justified by common law," Lord Camden indicated that a warrant might issue under appropriate circumstances to search for a libel (*id.* at 1072):

> If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution. All these particulars must be explained and proved to be law, before this general proposition can be established.

After concluding that the general warrant there involved failed to satisfy these standards, Lord Camden dismissed the additional argument that the search should be permitted because it had "utility * * * [as]

a means of detecting offenders by discovering evidence" (*id.* at 1073). In the course of rejecting such a contention, Lord Camden observed that "the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle" (*ibid.*).

It is this latter statement of Lord Camden that was quoted in *Boyd* v. *United States, supra,* 116 U.S. at 629, and was a principal basis of the *Boyd* dictum (116 U.S. at 633) that "the seizure of a man's private books and papers to be used in evidence against him" is equivalent to "compelling him to be a witness against himself." But Lord Camden never explained how subjection to a search and seizure of evidence forced a man to accuse himself. Indeed, in *Warden* v. *Hayden, supra,* the Court recognized that Lord Camden's dictum was not read by the English courts to bar all searches for papers (387 U.S. at 308–309 n. 12):

> Significantly, *Entick* v. *Carrington* itself has not been read by the English courts as making unlawful the seizure of all papers for use as evidence. See *Dillon* v. *O'Brien,* 20 L.R.Ir. 300; *Elias* v. *Pasmore,* [1934] 2 K.B. 164. Although *Dillon,* decided in 1887, involved instrumentalities, the court did not rely on this fact, but rather on "the interest which the State has in

> a person guilty (or reasonably believed to be guilty) of a crime being brought to justice * * *. 20 L.R.Ir., at 317.

Moreover, even after *Entick* v. *Carrington,* the right of silence was never construed in the American colonies as prohibiting the seizure of documentary evidence pursuant to a warrant. Rather, as Professor Levy has pointed out, objections to the seizure of documents were directed to the lack of specificity in the warrant (Levy, *Origins of the Fifth Amendment* 394 (1968)):

> Not even in the American cases following *Entick* v. *Carrington* did the colonial lawyers copy that precedent. Their argument was that while specific search warrants might be legal if issued on probable cause, a general warrant was illegal because it threatened personal liberty by vesting arbitrary power in the officer conducting the search.

Thus, the principal continuing impact of *Entick* is on Fourth Amendment jurisprudence. To the extent it has any other effect, it is in connection with those values of free expression fostered by the First Amendment, not those protected by the self-incrimination privilege. *Entick* involved an unrestrained search by government agents for seditious libel in the possession of John Entick, who was the author of a publication called Monitor or British Freeholder (see *Stanford* v. *Texas,* 379 U.S. 476, 483); perhaps the books and private papers seized from Entick would enjoy special protection deemed necessary to safeguard the right of

free expression (cf. *Stanley* v. *Georgia,* 394 U.S. 557), but these are unrelated to the policies of the self-incrimination privilege. See Levy, *supra, Origins of the Fifth Amendment* at 393; Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 Minn. L. Rev. 891, 911 (1960).[23]

This limited view of the scope of *Entick* appears to have been adopted by the Court in *Stanford* v. *Texas, supra.* There, the Court invalidated a warrant authorizing the search for and seizure of "books, records, pamphlets, cards * * * and other written instruments concerning the Communist Party of Texas" (*id. at* 478–479). The officers seized more than 2,000 documents, none of which pertained to the Communist Party of Texas. After citing *Entick* v. *Carrington* as authority against such police practice, the Court based its decision on the unconstitutional breadth of the warrant under the Fourth Amendment and not upon the notion that the Fifth Amendment prohibits the seizure of documentary evidence. In this connection, the Court noted that "the constitutional requirement that

[23] The books and records in issue in the instant case are hardly of the *Entick* character; they involved no expression of ideas, but instead documented the operation of petitioner's criminally fraudulent enterprise (see pp. 23–25, *supra*). Indeed, petitioner acknowledges (Br. 18) that he did not even personally prepare all of these records. Moreover, petitioner necessarily gave copies of many of the seized documents, relating to real estate transactions, to the persons with whom he dealt. Under these circumstances, even if the documents were not "instrumentalities" of petitioner's crimes, their comparatively impersonal nature renders them unlikely candidates for special protection from search and seizure.

warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain" (379 U.S. at 485). However, the Court made the following distinction between the seizure of materials pursuant to a general warrant as involved in *Entick* and the seizure of business books and records pursuant to a specific description in a search warant, as involved in the instant case (379 U.S. at 485 n. 16):

> The word "books" in the context of a phrase like "books and records" has, of course, a quite different meaning. A "book" which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case. See *Marron* v. *United States,* 275 U.S. 192, 198–199. And in some situations books even of the kind seized here might, for purposes of the Fourth Amendment, be constitutionally indistinguishable from other goods—*e.g.,* if the books were stolen property.

2. Apart from dicta in *Boyd*, we have found little in the decisions of this Court supporting petitioner's contention. The only recent appellate decision upholding the view that the Fifth Amendment bars the seizure pursuant to a warrant of an individual's business records is *Hill* v. *Philpott,* 445 F. 2d 144 (C.A. 7), certiorari denied, 404 U.S. 991. In that case, the majority held that the seizure by special agents of the Internal Revenue Service of a physician's fiscal records, which evidenced his evasion of taxes, violated his privilege

against self-incrimination. In so concluding, the court relied heavily upon cases holding that "where the Internal Revenue Service has sought court enforcement of its summons pursuant to statute (26 U.S.C. § 7402), * * * a taxpayer may refuse production of personal books and records by assertion of his privilege against self-incrimination" (445 F. 2d at 146).

As we have pointed out at the outset of our argument, those decisions should not control the question in this case. When the government proceeds by summons or subpoena, the individual is arguably required to testify against himself in complying with the subpoena, since the act of compliance evidences an admission that the documents are his or, at the very least, that they are the materials sought by the subpoena. On the other hand, as Dean Wigmore has observed, when documents or other effects are obtained pursuant to a search "the proof of their authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility." VIII Wigmore, *Evidence* § 2264, p. 380 (McNaughton rev. 1961).

In rejecting Wigmore's distinction between compliance with a subpoena and passive subjection to a search and seizure, the Seventh Circuit stated: "Dean Wigmore's suggestion * * * ignores the realities of trial. The jury knows the books and records belong to the defendant and the entries he has made therein speak against him as clearly as his own voice" (445

F. 2d at 149). We respectfully submit that this reasoning is unsound. Indeed, if the Seventh Circuit's observation were correct, the taxpayer's books and records in *Couch* v. *United States,* 409 U.S. 322, would have been eligible for the privilege despite her lack of possession of them, because they also spoke against her "as clearly as [her] own voice (445 F. 2d at 149). Moreover, non-documentary tangible evidence, such as the bloodstained trousers and floor mat in the trunk of Dombrowski's automobile (*Cady* v. *Dombrowski,* 413 U.S. 433) or the material under Murphy's fingernails (*Cupp* v. *Murphy,* 412 U.S. 291), "spoke" against those defendants every bit as eloquently as the real estate documents involved in the instant case "speak" against petitioner. The rationale of *Hill* v. *Philpott,* if applied according to the dictates of logic, would in fact require exclusion of all tangible evidence seized from a criminal defendant.

To be sure, the disclosure of the evidence in petitioner's books and records may be unwelcome, but such discomfiture is not a ground upon which to claim the privilege against self-incrimination. Just as the ingredient of testimonial compulsion was lacking in *Couch* because the owner of the books and records was not compelled to produce them, the search and seizure in this case similarly did not force petitioner to prepare the documents or to produce or authenticate them. As Mr. Justice Holmes succinctly stated for the Court in *Johnson* v. *United States,* 228 U.S. 457, 458, "[a] party is privileged from producing the

evidence but not from its production." The Fifth Amendment, in short, was not aimed at the kind of compelled communication generated by the evidence itself.

The analysis and result in *Hill* v. *Philpott* have been consistently rejected by other appellate courts. See, *e.g., Truitt* v. *Lenahan,* C.A. 6, No. 75–1694, decided February 5, 1976; *United States* v. *Beck,* 511 F. 2d 997 (C.A. 6); *United States* v. *Blank,* 459 F. 2d 383 (C.A. 6), certiorari denied, 409 U.S. 887; *United States* v. *Gargotto,* 476 F. 2d 1009, 1013–1014 (C.A. 6); *Taylor* v. *State of Minnesota,* 466 F. 2d 1119 (C.A. 8), certiorari denied, 410 U.S. 956; *United States* v. *Bennett,* 409 F. 2d 888 (C.A.), certiorari denied *sub nom. Haywood* v. *United States,* 396 U.S. 852; *United States* v. *Scharfman,* 448 F. 2d 1352 (C.A. 2), certiorari denied, 405 U.S. 919; *Shaffer* v. *Wilson,* 523 F. 2d 175 (C.A. 10), petition for a writ of certiorari pending, No. 75–601; *United States* v. *Murray,* 492 F. 2d 178, 191 (C.A. 9); but cf. *Vonder Ahe* v. *Howland,* 508 F. 2d 364, 372–377 (C.A. 9) (Ely, J., concurring and dissenting). See also *People* v. *Tucci,* 179 Colo. 373, 500 P. 2d 815 (*en banc*); *People* v. *Thayer,* 63 Cal. 2d 635, 408 P. 2d 108 (*en banc*), certiorari denied, 384 U.S. 908; *United States* v. *Iannelli,* 339 F. Supp. 171 (W.D. Pa.); *United States* v. *Curreri,* 368 F Supp. 757 (D. Md.).[24] If books and records are

[24] Although this Court has recently cited *Hill* v. *Philpott* in two of its opinions, those cases involved Fifth Amendment questions unrelated to the issue here, and the citations, while illustrative, were not necessarily approving. See *Couch* v. *United States,* 409

to be treated differently from other objects of evidential value and even other "communicative" matter such as private conversations (which cases such as *Hoffa* and *Katz* indicate may constitutionally be seized), support for such a distinction—lacking in the history or language of the Fifth Amendment or the weight of appellate authority—must come, if at all, from a consideration of the policies underlying the privilege. It is to this subject that we now turn.

D. THE VALUES REFLECTED BY THE PRIVILEGE AGAINST SELF-INCRIMINATION ARE NOT IMPAIRED BY THE SEARCH AND SEIZURE OF PETITIONER'S BUSINESS RECORDS

The most comprehensive statement of the policies underlying the privilege against self-incrimination was made by this Court in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55:

> [The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play

U.S. 322, 330; *Bellis* v. *United States*, 417 U.S. 85, 88. However, even if the rule of *Hill* v. *Philpott* were applicable in this case, it would require a document-by-document analysis in order to determine which documents contained "entries" prepared by petitioner. See, *e.g.*, *United States* v. *DeMarsh*, 360 F. Supp. 132 (E.D. Wis.); *United States* v. *A Walk-In Vault*, 395 F. Supp. 833 (E.D. Wis.).

> which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald*, 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States*, 349 U.S. 155, 162.

While the Court has subsequently observed in *Schmerber* v. *California, supra,* 384 U.S. at 762, that "the privilege has never been given the full scope which the values it helps to protect suggest," a comparison of this case with the *Murphy* formulation is nevertheless instructive, since it shows that most of these values are not even remotely affected by the search for and seizure of documents pursuant to a warrant complying with the requirements of the Fourth Amendment.

The concern with the "cruel trilemma," which is at the core of the protection secured by the privilege, might perhaps have been activated had the law enforcement officers investigating petitioner's crimes sought to compel oral testimony from petitioner regarding the transactions or his authentication of the

seized records. But petitioner can hardly claim that he was subjected to "the cruel trilemma of self-accusation, perjury or contempt" when he was never required to perform any act, much less a testimonial act, and was not in any way exposed to sanction for either perjury or contempt.

Nor could the search in this case in any way have offended our preference for an accusatorial rather than an inquisitorial system of criminal justice. After the seizure of petitioner's records, the State was still obliged to authenticate them through its own witnesses and bear the burden of proving petitioner's guilt beyond a reasonable doubt. The bare fact that petitioner was in some remote way the source of evidence contributing to his conviction (in somewhat the same sense that a robber's presence at the bank he robs is the "source" of eyewitness identification testimony) does not affect the admissibility of the evidence in an accusatorial proceeding. Here petitioner was far less the "supplier" of incriminating evidence than were the defendants in cases such as *Schmerber, Wade, Dionisio,* and *Mara,* who were required to create evidence by affirmative acts compelled at a time when they had become criminal suspects.

Moreover, this case does not involve any "inhumane treatment and abuses," nor the distrust which attaches to "self-deprecatory statements," nor possible impairment of any protection to the innocent. Documentary evidence of the kind at issue here has correctly been described as "the most reliable evidence that can

exist." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. Cin. L. Rev. 671, 702 (1968). Similarly, the search and seizure of petitioner's books and records should not disturb our sense of "fair play." After a thorough investigation demonstrated that there was probable cause to believe that petitioner was engaged in a series of fraudulent real estate transactions that injured many innocent people, it can hardly be denied that "good cause [was] shown for disturbing him." Under these circumstances, the power of the state to disturb the privacy of the individual by subjecting him to arrest, and his premises to search, are beyond question.

Of all the values arguably reflected by the privilege against compelled self-incrimination, only the privacy interests identified in the "private enclave" term employed by Judge Frank in *Grunewald* has even the remotest connection to the seizure of personal papers. While privacy interests have been alluded to in recent Amendment decisions of this Court (*Bellis* v. *United States,* 417 U.S. 85, 91; *Couch* v. *United States, supra,* 409 U.S. at 327), we think Judge Friendly correctly suggested, in his thoughtful analysis of the matter in *In re Horowitz, supra,* 482 F. 2d at 85–86, that the protection of privacy interests is basically the province of the Fourth Amendment and is not the core of the self-incrimination privilege. As Judge Friendly noted, "no Supreme Court decision has upheld a Fifth Amendment

claim predicated solely, or even primarily, on the basis of an invasion of privacy * * *" (*id* at 85). Despite any allusions to privacy, the privilege has traditionally been and remains today applicable only when the two indispensible elements of testimonial compulsion and potential for incrimination conjoin.

Indeed, we submit that privacy values are no more implicated in this case than in any other search and seizure in an individual's home or office. No one could doubt that law enforcement officers, in possession of a proper warrant, could search every nook and cranny of petitioner's office or home for weapons, items of clothing, stolen property or other contraband, and the like. As this Court long ago recognized in *Gouled,* a Fourth Amendment case in which privacy interests were necessarily paramount in the Court's analysis (see p. 30, *supra*), there is no sufficiently distinct and more substantial privacy interest invaded when the search is for papers [24] to justify an absolute immunity from search and seizure.

Surely, the invasion of petitioner's privacy arising from the seizure of his business records is no greater than that entailed in the extraction of the blood sample sanctioned by the Court in *Schmerber* or the

[24] As we have discussed at the outset of our argument (pp. 23–25, *supra*), the papers at issue here are hardly of the intimate personal character warranting the protection of the privilege against self-incrimination. To the contrary, an examination of our Appendix of Exhibits confirms the correctness of the Maryland Court of Special Appeals' characterization of them as largely "deeds of easements, declarations of covenants, abstract reports, deeds of trust and title binders" (Pet. App. A. 46).

eavesdropping that *Katz* and *Berger* indicated could be undertaken if Fourth Amendment prerequisites are satisfied. Moreover, the long line of authority antedating the adoption of the Constitution that a witness may not refuse to testify once he is given immunity from prosecution (see *Kastigar* v. *United States,* 406 U.S. 441, 445–446, n. 13) establishes that the self-incrimination provision does not absolutely prohibit invasions of privacy by the state.[25]

It is therefore plain that the zone of privacy recognized by the Fifth Amendment is simply coextensive with the scope of the prohibition against testimonial compulsion. As the Court recently observed in *Bellis* v. *United States, supra,* 417 U.S. at 91 (emphasis supplied):

> We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought"—an inner sanctum which necessarily includes an individual's papers and effects *to the extent that the privilege bars their compulsory production and authentication—and "proscribes state intrusion to extract self-condemnation." Couch* v. *United States, supra,* at 327.

[25] We recognize that a search of documentary evidence may, under certain circumstances, constitute a greater invasion of privacy than the ordinary search for other kinds of real or physical evidence, since it may entail an examination of various unrelated documents with which the document or documents described in the warrant may be intermingled (see *United States* v. *Bennett*, *supra*, 409 F. 2d at 896, 897; American Law Institute, *A Model Code of Pre-Arraignment Procedure*, *supra*, at Section SS 210.3). How-

CONCLUSION

For the reasons stated, the judgment of the Court of Special Appeals of Maryland should be affirmed if it is concluded that the search and seizure was conducted in conformity with the procedural requirements of the Fourth Amendment.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
ANDREW L. FREY,
Deputy Solicitor General.
STUART A. SMITH,
Assistant to the Solicitor General.
EDWARD R. KORMAN,
WYNETTE J. HEWETT,
Attorneys.

FEBRUARY 1976.

---

ever, this problem is always present where conversations are seized by wiretapping or eavesdropping. Yet it is settled that conversations so seized are not subject to any *per se* exclusionary rule predicated on either Fourth or Fifth Amendment grounds. Instead, the privacy interests at stake are protected by the procedural requirements of the Fourth Amendment. See *Katz* v. *United States*, 389 U.S. 347; *Berger* v. *New York*, 388 U.S. 41.

U.S. GOVERNMENT PRINTING OFFICE: 1976

Supreme Court, U. S.
FILED
FEB 14 1976
MICHAEL RODAK, JR., CLERK

No. 74-1646

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER C. ANDRESEN, PETITIONER

v.

STATE OF MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

UNITED STATES APPENDIX OF EXHIBITS

TABLE OF CONTENTS

	Page
Items seized from Mount Vernon Development Corporation offices and admitted into evidence at trial	1
State's Exhibit 1 [file captioned "Potomac Wood, General"]	1
1B. Summary of releases State National bank of Bethesda	1
1C. Summary of releases Lumsden note	2
1D. Summary of releases F.O Day Company	3
Items seized from petitioner's law offices and admitted into evidence at trial	4
State's Exhibit 2 [file caption "Clark-King to Holtzclaw 70–307 7(t) P.W."	4
2A. Letter requesting title insurance dated July 9, 1970	4
2B. Waiver of right to receive evidence of releases	5
2C. Letter from Tobin requiring encumbrance on 7T dated July 18, 1972	6
2D. Settlement statement for buyer	7
2E. Notice to Buyer, federal reserve regulation Z	8
2F. Release of F.O. Day deed of trust	9
2G. Plat lot 7T	10
2H. Letter of instructions from Enterprise Federal Savings & Loan dated July 9, 1970	11
2I. Settlement statement for seller	12
2J. Title Insurance binder and Attorney's report of title	13
2K. Check stub from Enterprise Federal Savings & Loan Association	16

Items seized from petitioner's law offices—Con.
State's Exhibit 2—Continued
2L. Settlement charges statement from Enterprise Savings & Loan Association ---------- Page 17
2M. Deed of trust, loan application for construction loan, bond, cover letter dated September 11, 1970, plat. settlement charges, and ledger sheet ---------- 18
State's Exhibit 3 [file captioned "Antonelli Mount Vernon to Young contracting Company 72–242"]---------- 28
3A. Settlement statement for buyer-- 28
3B. Settlement statement for mortgagor ---------- 29
3C. Note from Young to Andresen dated July 17, 1972---------- 30
3D. Election not to obtain title insurance (copy)---------- 32
3E. Election not to obtain title insurance (original)---------- 33
State's Exhibit 4 (File captioned "Clark-King to Antonelli 69–351 13(t)"-------- 34
4. Handwritten notes dated March 22, 1972 ---------- 34
State's Exhibit 10---------- 35
10A. Deed of trust from Clark-King to F. O. Day dated March 27, 1972 ---------- 35
State's Exhibit 20 [1] [handwriting samples]- 39
20A. Handwritten note to F. O. Day Co. dated September 26, 1972- 39

[1] State's Exhibit 20A was not seized from petitioner's law offices but was produced from the records of F. O. Day Company (Tr. 354) and used as a known sample of petitioner's handwriting.

Items seized from petitioner's law offices—Con.
State's Exhibit 20 [1] handwriting—Continued
20B. Four known handwriting samples ---------- Page 40
20C. Request for handwriting analysis and source of samples-------- 41
20D. Handwriting samples analyzed by handwriting expert------- 44
Contract for the purchase of lot 13T ---------- 44
Note entitled "Standard Charges" 45
Note dated July 18 regarding case 72–242---------- 46
Settlement statement for mortgagor regarding 13T---------- 47
Settlement statement for seller Mt. Vernon to Young--------- 48
Settlement statement for buyer Mt. Vernon to Young-------- 49
Settlement statement for seller Antonelli to Mt. Vernon------ 50
Settlement statement for buyer regarding 13T---------- 51
Attorney's report to Title Insurance Co. of Minnesota regarding case 72–242---------- 52

Exhibit 20B consisted of four known samples of petitioner's handwriting which were not seized from petitioner's law offices. They were used by a handwriting expert to identify the other documents which were seized. (Tr. 469–470.) Exhibit 20C is a request for handwriting analysis for the Bi-County Frauds Unit and contains a list of the documents to be analyzed including the identity of the files from which they were removed. (Tr. 471–472.) Exhibit 20D designates the photocopies of the documents which were analyzed by the handwriting expert. Handwriting identified as petitioner's is encircled. (Tr. 472–473.)

Items seized from petitioner's law offices—Con.
State's Exhibit 20[1] handwriting—Continued
20D. Handwriting samples—Continued
Handwritten notes regarding Lot 13T and attorney's final report to Title Ins. Co. of Minn, regarding case 72–242 ---------- Page 53
Antonelli—Mt. Vernon to Young (escrow accounting sheet) ---- 55
Note (notation 13(T)) ---------- 56
Attorney's Report of Title concerning Lot 13T ---------- 57
Settlement for Buyer Lot 13T -- 58
Settlement statement for buyer Lot 13T ---------- 59
Settlement statement for seller case No. 69–351 ---------- 60
Attorney's final report case No. 69–351 (Antonelli and Caniglia) - 61
Note: set up deferred card for Clark ---------- 62
Clark-King to Antonelli (escrow account) ---------- 63
Note: Pay $1000.00 7T ---------- 64
Settlement statement for buyer 7T ---------- 65
Settlement statement for seller case No. 70–307 ---------- 66
Clark-King to Holtzclaw (escrow account) ---------- 67
Attorney's final report of title (Holtzclaw) ---------- 69
2ORR[2]

[2] The remainder of the exhibits in the handwriting file are not reproduced here. They are the original documents which were submitted to the handwriting expert for identification. (Tr. 472–473.)

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
[redacted]
[redacted]

ABSTRACT

D/T Fld 7-26-68 Rec 8-2-68
fr: Clark-King Contracting Company Inc
to: Peter C. Andresen + William H. Matthews
re: State National Bank of Bethesda
Amt $31,000.00

Law 3773 Pub 598

Lot	Blk	Sec	Reference	Lot	Blk	Sec	Reference
2	S	4	3904/388	5	T	10	
1	R	4	3837/758	6	T	10	rel 4238/3
4	S	9	3738/373	7	T	10	
5	S	9	3902/263	8	T	10	4041/76 [illegible] 4041/76
7	S	9	3804/234	9	T	10	4098/58
21	R	9		10	T	10	rel 4238/651
9	S	10	3858/381	11	T	10	rel 4238/651
10	S	10	3884/337	12	T	10	
11	S	10	3956/676	13	T	10	
12	S	10	3961/219				
13	S	10	4067/325				
14	S	10	rel pa 11-1-71	4142/885			
15	S	10	released 4165/225				
16	S	10					
22	R	10	3857/781	POTOMAC WOODS			
23	R	10	3883/965				
24	R	10	3943/314				
25	R	10	3943/319				
26	R	10	3917/833				

Remarks: The D/T subordinated to D/T 3717/7..
by sub agt 3804/306

Abstracted by: The D/T subordinates to D/Ts 3942/533 + 5..
by sub agt as 2-1-71

[State's Exhibit 20]

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
9705 FORTY AVENUE
HYATTSVILLE, MARYLAND

ABSTRACT

Liber 3797 Folio 799

D/T dtd 9-27-68 rec 10-9-68
fr: Clark-King Construction Co, Inc
to: James William Justis, III, and Anna Mc Donald T...
ag: Barbara Dale Lavender
Amt: $24,000.00

Lot	Blk	Sec	Release
23	R	10	3883/863
24	R	10	3957/358
25	R	10	3957/358
26	R	10	3913/184
6	T	10	4272/117
7	T	10	rel rec 7-22-71 4089/742
8	T	10	rel rec 7-22-71 4089/740
9	T	10	rel rec 11-8-71 4145/728
10	T	10	rel rec 7-22-71 4089/742
11	T	10	
12	T	10	
13	T	10	
11	S	10	3960/275
12	S	10	3983/425
13	S	10	4062/415
14	S	10	rel rec 11-16-71 4151/142
15	S	10	
16	S	10	

Potomac Woods

Remarks: D/T 3773/548 subordinated to this D/T by Sub agmt 3804/306

Abstracted by:

[State's Exhibit 10]

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
9705 FORTY AVENUE
HYATTSVILLE, MARYLAND

ABSTRACT

Liber 3934 Folio 772

D/T dtd 12-13-69 rec 1-22-70
fr: Clark-King Construction Co, Inc
to: Peter C. Andresen & Wilton B. Wheeler
ag: E.O. Day Co, Inc
Amt $37,000.00

Lot	Blk	Sec	Release
14	2		— Peachy Park
24	R	10	
25	R	10	rel 4239/547
11	S	10	
12	S	10	rel 4226/460
13	S	10	rel 4062/413
5	T	10	
6	T	10	
7	T	10	Potomac Woods rel 4262/751
8	T	10	rel rec 6-28-71 4086/255
14	S	10	rel 4238/657
15	S	10	rel 4238/657
16	S	10	
9	T	10	
10	T	10	rel rec 7-22-71 4098/56
11	T	10	
12	T	10	rel 4238/649

Remarks:

Abstracted by:

[State's Exhibit 10]

TO: PETER C. ANDRESEN, ANY TITLE INSURANCE COMPANY AND/OR ANY OTHER INTERESTED PARTY

RE: Lot 7, Block T, Potomac Woods, Sec. 10, Montgomery County, Md.

1887 Milboro Drive, Rockville, Maryland 20850

This will acknowledged that I, the undersigned, have been fully informed of my right to obtain an owner's policy of title insurance, and . . .

That I understand that a mortgagee title insurance policy will be issued to Enterprise Federal Savings & Loan Association in the amount of $38,000.00 and . . .

That said mortgagee policy does not insure my investment in the subject real estate whatever and . . .

That I am entitled to protect my real estate investment by purchasing an owner's policy of title insurance in an amount not less than $48,000.00, this being the full purchase price paid for the subject property, and . . .

Therefore, I acknowledge all of the above by executing this instrument and hereby instruct you X to issue ____ not to issue an owner's policy of title insurance naming me as insured title owner of the subject property.

If I have elected not to purchase an owner's policy of title insurance, I recognize and acknowledge that Peter C. Andresen, any Title Insurance Company and/or any other Interested Party neither now has nor hereafter will have any liability or responsibility to me with respect to or in connection with the closing or disbursement of settlement funds or with respect to any defect in or lien or encumbrance on the title to the above described premises.

Robert E. Holtzclaw
Robert E. Holtzclaw

Joyce Lynn Holtzclaw
Joyce Lynn Holtzclaw

July 9, 1970
Date

[State's Exhibit 2A]

NOTICE TO BUYER AND SELLER AS TO EVIDENCE OF RELEASE(S) TO BE FURNISHED THEM

PROPERTY: 1887 Milboro Drive, Rockville, Md. DATE: July 9, 1970

Lot 7, Block T, Potomac Woods, Sec. 10, CASE NO. 70-307

Montgomery County, Maryland

In connection with the settlement of the sale and conveyance of title in this transaction, Notice is hereby given:

(1) That you are entitled to be furnished by Peter C. Andresen, the settlement attorney, evidence of recorded release(s) of mortgage(s) or deed(s) of trust to be obtained with all or part of the funds to be disbursed, within 30 days from the date of delivery of the deed conveying title to captioned property.

(2) That if the recording of the release(s) will be delayed beyond the 30 day period, a letter explaining the delay shall be mailed to you by or through this law firm within the 30 day period.

(3) That the procedure of mailing a letter of explanation each 30 days is necessary until the required evidence of recorded release(s) is furnished to you.

(4) That if the evidence of a recorded release is not furnished you within the required period of time, you or either of you, or an organized Bar Association of the State of Maryland may petition a Court of Equity to accomplish this purpose.

(5) That in the event that the funds are properly disbursed by said settlement attorney within 5 days from the date of delivery of the deed, the law does not require that you be furnished evidence of recorded release(s) unless you specifically request that we do so.

This Notice is given you pursuant to Section 42, Article 21 of the Annotated Code of Maryland. You are required to acknowledge that this Notice was given you prior to the execution of the deed conveying title to the property.

ACKNOWLEDGMENT OF NOTICE

The undersigned buyer and seller acknowledge receiving the foregoing Notice and request that evidence of recorded release(s) be furnished them.

Buyer _____ Seller _____

Buyer _____ Seller _____

Witness as to all

We hereby waive being furnished evidence of recorded releases(s): having been assured by said settlement attorney that all funds in this transaction will have been disbursed within 5 days from the date of delivery of the deed.

Robert E. Holtzclaw
Buyer

Clarke Long Co. Tr. Co.
Seller

Joyce Lynn Holtzclaw
Buyer

[illegible]
Seller

Witness as to all

[A copy of this document was also introduced as part of State's Exhibit 29 from Robert Holtzclaw's records of the transaction. (Tr. 131-132.)]

[State's Exhibit 2B]

LAW OFFICES
TOBIN & MCHUGH
414 HUNGERFORD DRIVE
ROCKVILLE, MARYLAND 20850

CHARLES MICHAEL TOBIN
JOHN J. MCHUGH

DISTRICT OF COLUMBIA

July 18, 1972

Peter C. Andresen, Esquire
3700 Decatur Avenue
Kensington, MD 20795

Re: Lot 7, Block T, Section 10
Potomac Woods

Dear Mr. Andresen:

It has come to the attention of my clients, Mr. and Mrs. Robert Holtzclaw, record title holders of the above-captioned property, that there is an encumbrance on this property in the sum of $2,000.00 for an indebtedness to F. O. Day Co., Inc. As of the end of June, 1972, this indebtedness had not, at least as a matter of record, been satisfied.

Please see to it that F. O. Day Co., Inc., is paid the sum due it, that a deed of release is properly executed by the Trustees and that the same is recorded in the land records of Montgomery County.

Upon accomplishing this, I wish a copy of the Deed of Release certified to be a true copy and a copy of the receipt of recordation. My clients further wish to have the attorney's fees which they have incurred for my services in connection with this matter paid by whoever is responsible for the failure to release this trust in a timely manner.

Very truly yours,

Charles Michael Tobin

CMT:lm

[redacted]

[A copy of this document was also introduced as State's exhibit 30 from Robert Holtzclaw's records. (Tr. 138-139.)]

[State's Exhibit 2C]

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3366

PETER C. ANDRESEN
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 302
7002 GEORGIA AVENUE N. W.
WASHINGTON, D. C. 20012

SETTLEMENT STATEMENT FOR Buyer

Property: Lot 7, Block T, Sec. 10, Potomac Woods Date July 2, 1970

Clark-King Construction Company, Inc. TO:

Robert F. Holtzclaw et ux Joyce Lynn Holtzclaw Case No. 70-307

No liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record unless examination is made. Responsibility is not assumed for any monies due or payable, which at time of settlement are contingent upon assignment of funds not at such time available, said settlement and the payment of proceeds and disbursements hereunder are subject to readjustment of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT	CREDIT
Purchase Price or Loan Proceeds	$ 48,000 00	$
Deposit		5,450 00
Broker Commission		
– First Mortgage or Trust Enterprise		38,000 00
Interest Adjustment 7/9/70 to 7/10/70	8 21	
– Second Mortgage or Trust		
Interest Adjustment		
Adjust State & County (and T.P.B.C.) Tax at $ 49.98		1 12
Adjust Town/Land Tax at $ 107.70		2 02
Adjust Rent at $		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( ) furnished	6 50	
Tax Certification & Service		
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report		
Release/Trustee Fee	4 00	
Notary Public Fee	60 00	
Survey	34 50	
Recording & Service: Deed $ 14.00; Mtg. or Trust $ 20.50		
Release $; $	25 00	
Prepare: Deed $ 25.00; Mtg. or Trust $		
Release $; $	15 40	
State Recording Tax Stamps	220 00	
State Transfer Tax	480 00	
County Transfer Tax	110 00	
Title Insurance & Application, Mortgagee & Owners	220 00	
Examine Title		
Title Certificate		
Deposit in Escrow for Lender:		
Insurance 11 Months 6/11-1/1/71	1,090 00	
Taxes Months	33 00	
NOTE: Intervise conveyances		
	25 00	
Settlement Charge		1,034 17
Balance Due From Buyers by Check		
Balance Due To Sellers or Mortgagors	$ 50,487 [illegible]	$ 50,487 [illegible]
TOTALS		

Approved and Copy hereof received

Robert F. Holtzclaw

Joyce Lynn Holtzclaw

CERTIFIED TRUE COPY

[A copy of this document was also introduced as part of State's Exhibit 29 from Robert Holtzclaw's records. (Tr. 131.)]

[State's Exhibit 2B]

NOTICE TO CUSTOMERS
REQUIRED BY FEDERAL LAW
FEDERAL RESERVE REGULATION Z

REAL PROPERTY TRANSACTION—PURCHASE LOAN
SECURED BY FIRST LIEN ON A DWELLING

LOAN NO. _____

The FINANCE CHARGE on this transaction will begin to accrue on July 9, 1970

The AMOUNT OF THE LOAN in this transaction is ..... $ 28,000.00

Less the PREPAID FINANCE CHARGE on this transaction which includes:

1. Interest Prepayment	$ 8.21	5.	$		
2.	$	6.	$		
3.	$	7.	$		
4.	$	8.	$		
			TOTAL $		8.21

Equals the AMOUNT FINANCED in this transaction ..... $ 27,991.79

This amount includes:

1.	$	5.	$		
2.	$	6.	$		
3.	$	7.	$		
4.	$	8.	$		
		NET PROCEEDS	$		

The ANNUAL PERCENTAGE RATE on this transaction is 8 %

Itemized CHARGES EXCLUDABLE from the FINANCE CHARGE in this transaction:

1 R.E. Tax Prepayment	$ 1,056.00	5.	$		
2 Title Attorney Fees	$	6.	$		
3.	$	7.	$		
4.	$	8.	$		

Payments for principal and interest on this transaction shall be 300 monthly installments of $ 293.36 beginning on the 10th day of August 19 70 and due on the 10th day of each month thereafter.

This institution's security interest in this transaction is a Deed of Trust on property located at 1887 Milboro Drive Rockville, Maryland also specifically described in the documents furnished for this loan. The documents executed in connection with this transaction cover all after-acquired property and also stand as security for future advances, the terms for which are described in the documents.

Describe late payment formula, if any, in accordance with Section 226.8(b)(4)

$2.00 may be charged when current payment is missed during any calendar month.

Describe prepayment formula, if any, in accordance with Section 226.8(b)(6)

For a 3-year period from this date, 33 1/3% of original amount of loan can be Prepaid in any 12 month period without penalty. Amounts in excess of 33 1/3% may be charged 60 days' interest.

Describe security interest, if any, held in connection with this transaction

N/A

Miscellaneous disclosures, or explanations, if any

After 3-years from this date, the interest rate on this loan may be increased by 1%

INSURANCE

PROPERTY INSURANCE

Property insurance, if written in connection with this loan, may be obtained by borrower through any person of his choice, provided however, the creditor reserves the right to refuse, for reasonable cause, to accept an insurer offered by the borrower. If borrower desires property insurance to be obtained from or through the creditor, the cost will be $ _____ for the _____ year term of the initial policy.

OTHER INSURANCE

Credit life, accident, health or loss of income insurance is not required to obtain this loan. No charge is made for such insurance and no such insurance is provided unless the borrower signs the appropriate statement below. _____ is available at a cost of $_____ for the _____ year term of the initial policy. (Type of insurance)

I desire _____ insurance coverage. I DO NOT desire such insurance coverage.

7/9/70 (Date) Robert E. Holtzclaw (Signature) Joyce Lynn Holtzclaw (Signature)

ENTERPRISE FEDERAL SAVINGS & LOAN ASSOCIATION I hereby acknowledge receipt of the disclosures made in this notice.

James P. Selman (Institution) Robert E. Holtzclaw (Customer)

Assistant Secretary-Treasurer (Title) Joyce Lynn Holtzclaw (Customer)

July 8, 1970 (Date) (Date)

[A certified copy of this document was admitted as part of State's Exhibit 34 from the land records of Montgomery County. (Tr. 276, 287.)]

[State's Exhibit 2E]

(8-71)(P) PURCHASE LOAN ACCOUNTING DIVISION (REV. 8/69)

Know all Men by These Presents

That We, PETER C. ANDRESEN and WILLIAM B. WHEELER

trustees under a certain Deed of Trust from CLARK-KING CONSTRUCTION COMPANY, INC.

dated December 13, 1969 and recorded in Liber 3934, folio 772 of the Land Records of Montgomery County, Maryland in consideration of One Dollar in hand paid by

CLARK-KING CONSTRUCTION COMPANY, INC.

do hereby grant and release unto the said

CLARK-KING CONSTRUCTION COMPANY, INC.

the following-described land and premises with the improvements, easements, and appurtenances thereunto belonging, situate in Montgomery County, Maryland, namely:

Lot numbered Seven (7) in Block lettered "T" in the subdivision known as "POTOMAC WOODS, Section Ten (10)", as per plat thereof recorded in Plat Book 83, Plat 8673, one of the Land Records of Montgomery County, Maryland .

fully released and discharged from the effect and operation of said Deed of Trust, the promissory note secured thereby having been paid and satisfied to the extent necessary to warrant release of the herein described property.

This release approved: P. O. DAY COMPANY, INC. By: _____

Witness, Our hands and seals this 3rd day of July, A.D. 1972

Signed, sealed and delivered in the presence of—

Lori Hall (LORI HALL) — Peter C. Andresen [SEAL] PETER C. ANDRESEN Trustee.

William B. Wheeler [SEAL] WILLIAM B. WHEELER Trustee.

United States of America

STATE OF MARYLAND

COUNTY OF MONTGOMERY

On this 3rd day of August 1972, before me, Lori Hall the subscriber, personally appeared Peter C. Andresen said known to me (or satisfactorily proven) to be the person(s) whose name(s) is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF I have hereunto set my hand and official seal.

Lori Hall (LORI HALL) Notary Public

My commission expires on the 1st day of July A.D., 1973

[A certified copy of this document was admitted as part of State's Exhibit 34 from the land records of Montgomery County. (Tr. 276, 287.)]

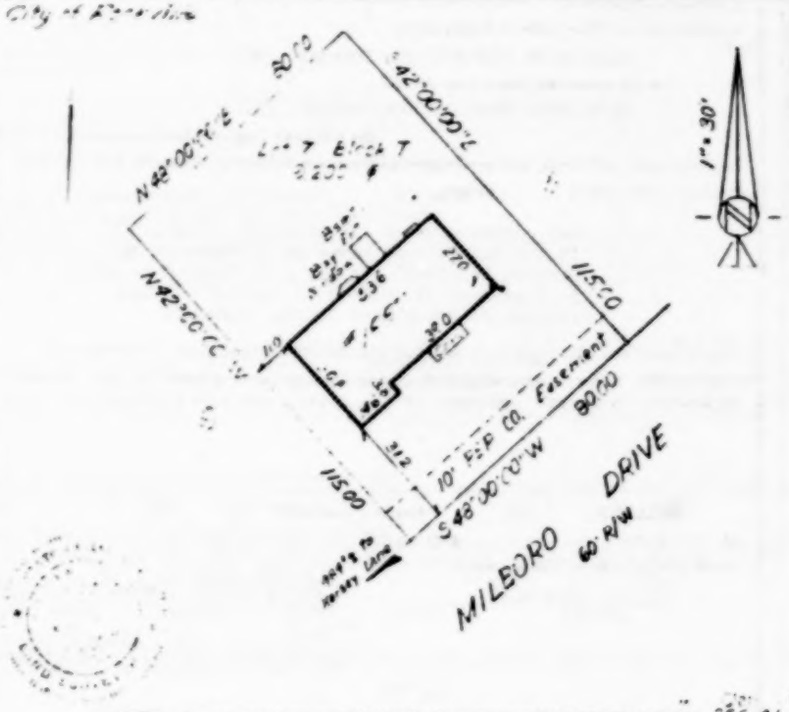
[State's Exhibit 2F]

HANSON & DEN OUTER CIVIL ENGINEERS • LAND SURVEYORS • LAND PLANNING CONSULTANTS

172 ROLLINS AVE., ROCKVILLE, MD. 20852
Phone (301) 427-7670

HOUSE LOCATION SURVEY

LOT 7 BLOCK T
SECTION 7 & N
POTOMAC WOODS
PLAT BOOK 23 PLAT 2672



NOTE: Lot corners have not been set by this survey unless otherwise shown. 266 A1

I hereby certify that the location of the existing improvements shown hereon is correct as made by a transit-tape survey dated ... and that there are no encroachments either way across property lines unless otherwise shown.

Registered Land Surveyor, Md. No.

[State's Exhibit 2G]

ENTERPRISE Federal SAVINGS
AND LOAN ASSOCIATION
813 PENNSYLVANIA AVE., N. W.
WASHINGTON, D. C. 20004
PHONE 783-6600

Peter C. Andresen, Attny.
3700 Decatur Avenue
Kensington, Md.

July 9, 1970.

Gentlemen: In Re: Your Case No.

Enclosed are the following papers:

DEED OF TRUST AND BOND in the amount of $ 38,000.00
STATEMENT SHOWING OUR LOAN CHARGES and balance due you of $ 1,680.17 (check enclosed)
LOAN AUTHORIZATION ORDER for issuance of checks as per our statement
SIGNATURE CARD - LOAN AGREEMENTS (2)
LOAN APPLICATION - DISCLOSURE STATEMENT (in triplicate)
ACKNOWLEDGEMENT of Receipt of Settlement Statement - OUTSIDE INSURANCE AUTHORIZATION

Please send us the following:
SIGNED: SIGNATURE CARD, LOAN APPLICATION, LOAN AUTHORIZATION ORDER, and ACKNOWLEDGEMENT OF RECEIPT OF SETTLEMENT STATEMENT
SIGNED AND WITNESSED BOND (Do not make any alterations on bond).
COPY OF YOUR SETTLEMENT STATEMENT FOR BORROWER AND SELLER (Showing date, amount, purpose and ultimate recipient of all disbursements and disposition of the balance shown on statement.) Signed Original Loan Agreement & Disclosure Statement (copies are for borrowers) - Signed Outside Insurance Authorization
You are instructed to record the Deed of Trust and use our check when you are in a position to report the title to Lot 7 Block T "POTOMAC WOODS" , in Montgomery County, Maryland
Premises No. 1887 Milboro Drive, Rockville, Md.
good according to records, in fee simple, in Robert E. Holtzclaw and Joyce Lynn Holtzclaw, His wife, as Tenants by the Entirety,
subject to the enclosed Deed of Trust, which is to be a first lien against said property. A full coverage insured certificate of title covering both the borrower and lender, on this property shall be furnished this Association as soon as possible.

SPECIAL INSTRUCTIONS Subject to a Purchase Price of $ 48,000.00 with a Down Payment of $ 10,000.00, please pay all Taxes and Assessments to June 30, 1970. Also, please have the borrowers sign the Disclosure Statement and then the Loan Agreements prior to all other papers. Please hold an amount from settlement for possible R.E. Tax levy.

Please advise the borrower that the first monthly payment on this loan will be due and payable at the office of the association on August 10 , 19 70 A pass book will be mailed to the borrower at the address inserted on the signature card, unless otherwise requested.

Very truly yours,

James P. Spellmon
President
Assistant Secretary
Assistant Treasurer

[A copy of this document was introduced as part of State's Exhibit 2H from the records of Enterprise Federal Savings & Loan Association. (Tr. 227, 230-231.)]

[State's Exhibit 2H]

BEST COPY AVAILABLE

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
[illegible] BEALE AVENUE
KENSINGTON, MARYLAND 20795
933-3366

PETER C. ANDRESEN
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 501
7900 GEORGIA AVENUE, N. W.
WASHINGTON, D. C. 20012

SETTLEMENT STATEMENT FOR Seller

Property: Lot 7, Block T, Sec. 10, Potomac Woods **Date** July 9, 1970

Clark-King Construction Company, Inc. **TO:**

Robert E. Holtzclaw et ux Joyce Lynn Holtzclaw **Case No.** 70--307

Reliability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record which examination of title might disclose. Responsibility is not assumed for any moneys due or payable, which at time of settlement are contingent upon assignment of funds not at such time available, said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT		CREDIT	
Purchase Price or Loan Proceeds	$		$ 48,000	00
Deposit Held by Seller	4,450	00		
Broker Commission County Wide Realty	2,400	00		
– First Mortgage or Trust Enterprise	35,000	00		
Interest Adjustment to date	240	12		
– Second Mortgage or Trust State MR	1,000	00		
Adjust 3rd Trust. Lawsden	1,333	00		
Adjust State & County (and F.F.B.C.) Tax at $ 49.98	1	12		
Adjust Town Tax at $ 107.70	2	32		
Adjust Rent at $				
Deposit For Payment Water Bill				
Fire Insurance: Premium ( ) Adjustment ( ) Cancel				
Tax Certification & Service				
Loan Commission and Discount				
Inspection/Conveyancing Fee				
Appraisal/Assumption Fee				
Credit Report				
Release/Trustee Fee	99	50		
Notary Public Fee				
Survey			45	00
Recording & Service: Deed $; **Mtg. or Trust $**				
* 5 @ **Release $** ; **$**	70	00		
Prepare: Deed $; **Mtg. or Trust $**				
Release $** ; **$				
State Recording Tax Stamps				
State Transfer Tax				
County Transfer Tax				
Title Insurance & Application, Mortgagee & Owners				
Policies Title 4th Trust r. F.D. Day	2,000	00		
Tax Certificate 5th Trust. Federline	2,000	00		
Deposits to Return to Lender Credit from 70-241 (Berry)			55	19
Insurance ... **Months**				
Taxes ... **Months**				
Assignment - Minnicks	1,000	00		
Assignment - Standard Supplies	1,500	00		
Settlement Charge	50	00		
Balance Due From Buyers by Check				
Balance Due To Sellers or Mortgagors			2,645	87
TOTALS	$ 50,746	06	$ 50,746	06

CERTIFIED TRUE COPY

[A copy of this document was admitted into evidence as State's Exhibit 56 from the records of Melvin Clark. (Tr. 956.)]

Approved and Copy hereof received.

[State's Exhibit 21]

TITLE INSURANCE COMPANY OF MINNESOTA

a Stock Company, of Minneapolis, Minnesota

INTERIM TITLE INSURANCE BINDER

Case No.

TO: Enterprise Federal Savings & Loan Association
613 Pennsylvania Avenue, N. W.
Washington, D. C.

No.

Title Insurance Company of Minnesota by this binder hereby insures you for a period of three months from the date herein against loss or damage not exceeding $ 37,000.00 which you may sustain because of any defects in the Report of Title attached hereto of the Approved Attorney, named therein, dated July 6, 197[illegible] at 3:00 P. M. Upon recordation of proper instruments creating the interest to be insured and payment of the consideration of the estate to be insured and after appropriate up-dated title search, a title policy will be issued subject only to matters shown in said Report of Title not properly satisfied or removed and provided there are no liens, encumbrances or objections intervening between the date and hour of said report and the date and hour of the recording of the instrument creating the interest to be insured, or in the case of a construction loan, the date and hour of each title bring down, unless such intervening matters are satisfied or removed.

The Policy will not insure against exercise and enforcement of governmental "police power".

IN WITNESS WHEREOF, the Company has executed this Binder, to be valid when countersigned by an authorized officer or agent of the Company, all in accordance with its By Laws. This Binder is effective as of the date and hour set out on the Report of Title attached hereto.

Issued at Kensington, Maryland
July 6, 1970

TITLE INSURANCE COMPANY OF MINNESOTA

R. M. Bennett
President

R. J. Garwood
Secretary

Countersigned
By
Authorized Officer or Agent
Peter C. Andresen

[A copy of this document was admitted as part of State's Exhibit 57 from the records of Title Insurance Company of Minnesota. (Tr. 710.)]

[State's Exhibit 23]

APPROVED ATTORNEYS REPORT OF TITLE

File No. _____

TO THE TITLE INSURANCE COMPANY OF MINNESOTA

The undersigned hereby certifies title to property located in the City of Rockville, County of Montgomery, State of Maryland, described as follows: (Attach copy if description is lengthy)

SCHEDULE A

Lot numbered Seven (7) in Block lettered "T", in the subdivision known as "FUTURE VILLAGE", Section Ten (10), as per plat thereof recorded at Plat Book 83, Plat 8673, one of the Land Records of Montgomery County, Maryland

is marketable and vested in fee simple as of the date hereof in Clark-King Construction Company, Incorporated under Deed from Aldre, Incorporated dated 12/18/64 and recorded 2/3/65 in Book 3322 Page 79 of the records of Montgomery County, Maryland

SUBJECT TO:

1. Mortgages (Deeds of Trust)

see attached sheet

2. City, County, and State Taxes, Special Assessments.
State, County & Town taxes paid thru 6/30/70.
WSSC FY'BC paid thru 12/31/69.

3. Judgments, if any.
NONE

4. Easements, recorded leases, other liens, objections and defects as follows (if set forth in restrictive covenants, refer to paragraph no.)

See attached sheet

5. Covenants or restriction (attach copy). DATED 10/7/65 RECORDED 10/8/65 in Book 3420/211 Page _____
Restrictions, if any, do not contain a forfeiture provision and have not been violated. Yes _____ No _____.

6. Building set back lines as noted on plat recorded (if set forth in restrictive covenants, refer to paragraph number) Minimum building restriction lines per dedication. These restriction lines have not been violated and this policy insures that a future violation thereof will not cause a forfeiture or reversion of title.

7. Matters of survey. If survey furnished, are there any errors or discrepancies? no

8. Mechanics' and materialmen's liens, if filing period has expired, so state, otherwise waivers must be submitted to remove this exception. Lien waiver to be furnished.

9. Rights and claims of parties, other than owners, in possession, if any None known

The undersigned hereby certifies the above is based on a personal examination of all public records affecting title for a period of 60 years, and to his knowledge there is no dispute as to the validity thereof

This is a sale to Robert E. Holtsclaw et ux Joyce Lynn Holtsclaw

This is a refinance only ☐

Binder requested ☒ Yes ☐ No The undersigned applies for the following policy insuring Enterprise Federal Savings & Loan Association as Lender; Amount of Loan $ 38,000.00

as Purchaser; Amount of Sale $ _____

The sale and/or loan will be ☐ FHA ☐ VA ☒ Conventional ☐ Construction

Settlement is to be at the offices of Peter C. Andresen

7700 Decatur Avenue, Kensington, Maryland

This certified down to 2/1 19 70 at 8 o'clock A M

Peter C. Andresen
Approved Attorney

A copy of this document was admitted as part of State's Exhibit 57 from the records of Title Insurance Company of Minnesota.

SUBJECT TO:

1. a. D/T dtd 9/12/69 rec 9/18/69 at 12:09 A.M. from Clark-King Construction Company, Inc. to The National Bank of Washington, Trustee, secures Enterprise Federal Savings & Loan Association in the sum of $106,000.00.

b. D/T dtd 7/26/68, rec 8/2/68 at Liber 3773, folio 598 from Clark-King Construction Company, Inc. to Peter C. Andresen & William H. Matthews, Trustees, secures State National Bank of Bethesda in the sum of $31,000.00

c. D/T dtd 9/27/68 rec 10/9/68 at Liber 3797, folio 799 from Clark-King Construction Company, Inc. to James William Salter, III & Owen McDonnell Taylor, Trustees securing Arthur Dale Lumsden in the sum of $24,000.00.

d. D/T dtd 12/13/69 rec 1/22/70 at Liber 3934, folio 772 from Clark-King Construction Company, Inc. to Peter C. Andresen & William B. Wheeler, Trs., securing F.D. Day Company, Inc. in the sum of $37,000.00.

e. D/T dtd 4/20/70 rec 5/19/70 at Liber 3962, folio 309 from Clark-King Construction Company, Inc. to Peter C. Andresen & Lawrence A. Shulman, Trs., securing James A. Federline, Inc. in the sum of $10,000.00.

4. a. 2 right-of-ways to C & P Telephone Company in usual form recorded at Liber 206, folio 51 and Liber 246, folio 120.

b. Easement granted to Pepco and C & P Telephone Company recorded at Liber 3411, folio 271.

c. Temporary slope easements as shown on record plat to be extinguished when all public improvements completed and accepted.

Peter C. Andresen

[A copy of this document was admitted as part of State's Exhibit 57 from the records of Title Insurance Company of Minnesota. (Tr. 710.)]

STATE'S EXHIBIT

ACCOUNT NO. L-14-926

OBJECT FOR WHICH DRAWN

Loan to R.E. & J.L. Holtzclaw @ 8%	$38,000.00	
Less check No. 2 22197	36,319.83	
Peter C. Andresen, Atty.		$1,680.17

70-307

ENTERPRISE Federal SAVINGS
AND LOAN ASSOCIATION
WASHINGTON, D. C. 20004

[A photocopy of a check in the amount of $1,680.17 was admitted as part of State's Exhibit 32A. (Tr. 232.)]

[State's Exhibit 2K]

LOAN NO. 1

NAME Mr. Robert E. & Mrs. Clyde Lee Holtzclaw, Jr. & Lynn Kelly Holtzclaw

IN ACCOUNT WITH

ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION

LOAN ON LOT 7 SQUARE Block 7 "B" Kensington

PREMISES: 1882 Milburn Drive Rockville, Md.

TO APPRAISAL FEE (Enterprise Federal Savings)

TO PREPARATION OF DEED OF TRUST (Thomas F. Burke) Record & Reproduction 3 yrs $ 40.00

TO INSURANCE (fire and extended coverage) (George P. Bergmann, Inc.) Ins. $ 40,000

To Fee Appraisal (Lt Martha)

To Interest Payment (Nov. Dec. 1969)

To Payment on Principal

To Interest on Principal

To Principal on Loan

BY LOAN (MONTHLY PAYMENT $ 282.36 plus INTEREST RATE 8 %)

BALANCE DUE Title Insurance Company of Minnesota

Payment $ 282.36 (Peter C. Andresen, Atty.)

Taxes $ 96.00 SETTLEMENT DATE: July 9, 1970

Insurance $ 5

Total $ 382.36 CASE NUMBER

1st PAYMENT DUE August 15, 1970

LIBER 3902 FOLIO 623

- 18 -

MARYLAND

Deed of Trust

Loan No. L 14-845

This Deed of Trust made this 12th day of September, A. D. 19 69

by and between CLARK-KING CONSTRUCTION COMPANY, INC., a Maryland corporation, acting herein pursuant to a Resolution of its Board of Directors, a duly certified copy of which is hereto annexed and made a part hereof,

hereinafter referred to as Borrower, and THE NATIONAL BANK OF WASHINGTON, a corporation organized under the laws of the United States, doing business in the District of Columbia, Trustee, hereinafter referred to as Trustee.

Whereas, Borrower, for value received, is justly indebted unto ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation organized and existing under the laws of the United States, hereinafter referred to as Association, in the full principal sum of

Thirty-five Thousand and 00/100 ($35,000.00) Dollars,** being money loaned

for which amount one certain Bond bearing even date herewith has been executed and delivered by Borrower to said Association; and, whereas, Borrower may, under this Deed of Trust, hereafter become further indebted unto said Association and may by further Bonds, duly executed and delivered to said Association, acknowledge Borrower to be so indebted, to a total amount not exceeding at any one time, however, the principal sum aforesaid, upon such conditions as may be in said Bonds set forth, all of said indebtedness being repayable, with interest, to said Association at its main office in Washington, D. C., or at any branch office or agency of the Association, hereafter designated by it, situated in the District of Columbia or in the State of Maryland, in monthly payments as in said Bonds provided; the intent of this Deed of Trust being to assure full and punctual repayment of the indebtedness evidenced by said Bonds, together with all advances and charges therein and herein agreed upon and hereby secured, upon the terms and conditions therein and herein contained.

Now, Therefore, to secure the performance of the conditions of said Bond, and all subsequent Bonds, as hereinbefore provided for, and in consideration of the premises and the sum of Ten ($10.00) Dollars, receipt of which is hereby acknowledged, Borrower hereby grant and convey unto said Trustee, in fee simple, the following described land and premises situate in Montgomery County, Maryland:

Lot numbered Seven (7) in Block lettered "T", in the subdivision known as "POTOMAC WOODS", Section Ten (10), as per plat thereof recorded at Plat Book 83, Plat 8673, one of the Land Records of Montgomery County, Maryland, subject to Rights of Way and Easements of Record;

SEP 18 MD
CLERK'S OFFICE MONTG CO.

(The loan secured by this Deed of Trust is a construction loan, payments to be made in installments in accordance with a loan agreement between the parties hereto dated September 12, 1969 hereby expressly referred to.)

*** The date fixed for the maturity of the debt hereby secured is December 1, A.D. 19 70; and any remaining unpaid balance of principal and interest thereon shall be and become due and payable on said date.

together with all the improvements (specifically including, but not limited to, all awnings, door, window and porch screens, storm windows, mantels, cabinets, linoleum, stoves, shades, venetian blinds, in-a-door beds, elevators, mechanical refrigerators, gas, oil and other fuel burning system and equipment, water heaters, radiator covers, and all plumbing, heating, lighting, cooking, ventilating, cooling, air-conditioning and refrigerating apparatus and equipment, whether in single units or centrally controlled, and each and every of the interior improvements and fixtures movable or immovable of every kind and description upon said land and premises or used in connection therewith, it being agreed and the intention of the parties hereto that the same shall be deemed to be fixtures and an accession to the freehold and a part of the realty, whether or not the same are physically attached thereto and that the same are specifically covered by this Deed of Trust and included in the term land and premises wherever used herein) now or hereafter erected or placed thereon or therein, together with all rights, ways, easements and appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of Borrower, of, in, to, or out of the said land and premises.

[Prior to the execution of these documents were introduced as part of State's Exhibit 3D from the records of Enterprise Federal Savings & Loan Association. (T. 239-240.)]

** See endorsement on back page, made a part hereof. [State's Exhibit 2M]

said by thereupon [illegible] changes of ownership [illegible]

8. That Borrower waives the [illegible] secured hereby and the land and premises [illegible]

9. That Borrower agrees to reimburse the Assn. [illegible] (including reasonable counsel fees) expended in and about the [illegible] [illegible] of this Trust or incurred or paid on account of any litigation [illegible] Trust, or to the indebtedness, or to the property or [illegible] sale which may be made as herein provided.

- 19 -

LIBER 3902 FOLIO 628

IN TESTIMONY WHEREOF, the said CLARK-KING CONSTRUCTION COMPANY, INC., has on the 12th day of September, 1969, caused these presents to be signed by MELVIN L. CLARK, JR., its President, attested by JOANNE K. CLARK, its Secretary, and its corporate seal to be hereunto affixed, and does hereby appoint MELVIN L. CLARK, JR. its true and lawful attorney-in-fact to acknowledge and deliver these presents as its act and deed.

CLARK-KING CONSTRUCTION COMPANY, INC.

By: M. L. Clark
President
Melvin L. Clark, Jr.

ATTEST:

J. K. Clark
Secretary
Joanne K. Clark

(CORPORATE SEAL)

State of Maryland)
) SS:
County of Montgomery)

I, Peter Andresen, a Notary Public in and for the State and County aforesaid, Do Hereby Certify that on the 12th day of September, 1969, MELVIN L. CLARK, JR. who is personally well known to me as the person named as attorney-in-fact in the foregoing Deed, bearing date on the 12th day of September, A.D. 19 69, and hereto annexed, personally appeared before me in said State and County and as attorney-in-fact as aforesaid, and by virtue of the authority vested in him by said Deed, acknowledged the same to be the act and deed of CLARK-KING CONSTRUCTION COMPANY, INC., the Grantor therein.

GIVEN under my hand and seal this 12th day of September, A.D. 19 69.

My Commission Expires July 1, 1970

Peter Andresen
Notary Public

Notary Public

LIBER 3902 FOLIO 629

CLARK-KING CONSTRUCTION COMPANY, INC.

RESOLVED, That CLARK-KING CONSTRUCTION COMPANY, INC., borrow the sum of $ - 35,000.00 - from ENTERPRISE FEDERAL SAVINGS AND L ASSOCIATION of the District of Columbia, to be secured by first deed of t on the real estate owned by CLARK-KING CONSTRUCTION COMPANY, INC., situated in MONTGOMERY COUNTY, MARYLAND, being: Lot 7 in Block "T", in the subdivision known as "POTOMAC WOODS", Section 10, as per plat thereof recorded at Plat Book 83, Plat 8673, one of the Land Records of Montgomery County, Maryland;

upon such terms and at such rate of interest as in the discretion of the President and Secretary may be advantageous or proper; and, in connection therewith, the President and Secretary are authorized to execute and deliv for and on behalf of and in the name of CLARK-KING CONSTRUCTION COMPANY, I such deed of trust and bond or other instrument as may be requisite or nec sary to consummate said loan.

I hereby certify that the foregoing is a true copy of a Resolution of the Board of Directors of CLARK-KING CONSTRUCTION COMPANY, INC., a Maryland corporation, passed on the 11th day of October, 1971, at a duly called meeting of the Board of Direc of said CLARK-KING CONSTRUCTION COMPANY, INC., at which a quorum of the Board of Directors was present and voting.

Secretary

Joanne K. Clark

(CORPORATE SEAL)

Notary Public

LIBER 4019 FOLIO 711

RELEASE OF DEED OF TRUST RECORDED SEPTEMBER 18, 1969 LIBER 3902 FOLIO 625,

FOR value received, The National Bank of Washington, the Trustee named in the within Deed of Trust, by Thomas A. Davis its Assistant Trust Officer, does hereby release said within Deed of Trust, the Bond secured thereby having been exhibited to it duly marked paid and canceled.

Witness its hand and seal this 23rd day of July, 1970

THE NATIONAL BANK OF WASHINGTON

BY: Thomas A. Davis, Assistant Trust Officer

ATTEST BY: Watson E. Ahlenfeld, Assistant Cashier

DEBT PAID ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION - July 23, 197

BY: Timothy A. Dunworth, Executive Vice-Pres

ATTEST BY: James P. Spelman, Asst. Secretary

CLERK'S OFFICE MONTG. CO., MD. 1970 NOV 20 AM 10:57

NOV 20 70 PAID $ 2 5 CLK CT. M.C. SR — ACK

Mail To:
Peter A Andersen
2700 Decatur Ave.
Kens. Md 20795

1615

RELEASED

MARYLAND

Deed of Trust

FROM:
CLARK-KING CONSTRUCTION COMPANY, INC.,
a Maryland corporation,

TO:
THE NATIONAL BANK OF WASHINGTON
Trustee

Securing
ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION
WASHINGTON, D. C.

Recorded for Record on the 18th day of Sept. A.D. 19 69, at 10:07 o'clock A. M. and recorded in Liber No. 3902 at Folio 625 one of the Land Records of Montg. Co. Md.

and examined by [illegible] Clerk

After recording, please mail to ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION 813 Pennsylvania Avenue, N. W. Washington, D. C. 20004

RELEASED

***And it is further understood and agreed that, prior to executing a partial or complete release under the terms of this Trust, the Trustee shall be entitled to charge and receive a fee of $25.00 for each such release, or $25.00 for each lot secured hereby so released.

I hereby certify that this Deed of Trust has been prepared by the undersigned, one of the parties named herein.

ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION

By

Martin A. Cook - President

L-14-845

ENTERPRISE *Federal* SAVINGS

AND LOAN ASSOCIATION

ORGANIZED MARCH 9, 1892

815 PENNSYLVANIA AVENUE, N. W.

WASHINGTON, D. C. 20004

TELEPHONE 783-6000

August 13, 1969

To: ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION:

The undersigned hereby applies for a monthly payment loan in the amount of Thirty-five Thousand and 00/100 ($ 35,000.00) Dollars to be secured by first deed of trust on lot 7 Block T Sec. 10 "POTOMAC WOODS", in Montgomery County, Maryland.

to

Improvements/consist of a detached 2-story brick and frame one family dwelling.

Premises No. Milboro Drive Rockville, Maryland.

Sale Price $ _____ Cash Down Payment $ _____

Refinance: _____

This is a Construction Loan

Repayments to be $ 270.20 monthly, including interest at the rate of 8 % per annum. A fully insured mortgagee certificate of title and other expenses and charges incident to said loan shall be paid by borrower. Title to be good of record in fee simple. Title to property to be in names of: Clark-King Construction Company, Inc., a Maryland corporation.

Remarks: The undersigned borrower states that the primary purpose of this loan is for business or commercial use.

Clark-King Construction Company, Inc., by:

(Sign Here) _____ (President)

(Sign Here) _____ (Secretary)

Mail Address _____

_____

Telephone _____

120 00	30 00	10 00	85 00	10 50 00	1 00						35000 00	6296 00	PURCHASE
								24 00	10 50 00	35000 00		$ 36296 00	REFINANCE
													E. F. S. REFINANCE
													OTHER PURPOSES

10" Montgomery Co. Md.

JN

Suphlz 195

$ 35,000.00 Loan No. L - 14-845

Bond

Secured by First Deed of Trust on Lot 7 in Block "T" in "POTOMAC WOODS" in Section 10 in Montgomery County, Maryland,

Dated September 12, A. D. 19 69.

Know all men by these presents:

That CLARK-KING CONSTRUCTION COMPANY, INC., a Maryland corporation, hereinafter referred to as Obligor or Borrower, — is — held and firmly bound unto ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION, Washington, D. C., a corporation organized and existing under the laws of the United States, in the full sum of Thirty-five Thousand and 00/100 ($35,000.00 -) Dollars, to be paid to said Association, for which payment, well and truly to be made, — it — binds itself, its successors ~~heirs, devisees, executors, administrators~~ and assigns, firmly by these presents.

Sealed with - its — seal- , and dated at Washington, D. C., this 12th day of September, A. D. 19 69.

Whereas, said Obligor, for value received, is justly indebted unto said Association in the full sum of Thirty-five Thousand and 00/100 ($-35,000.00 -) Dollars;

Now, Therefore, the Condition of this Obligation is such that if the said Obligor, or its successors - ~~heirs, devisees, executors, administrators~~ or assigns, shall pay said indebtedness or cause the same to be paid to said Association at its Office in Washington, D. C., in monthly payments of - Two Hundred Seventy and 20/100 ($270.20 -) Dollars, including interest at the rate of — Eight — per centum (- 8 - %) per annum, calculated monthly on the unpaid balance, the first payment to be made on the 1st day of December A. D. 19 70, and a like amount on the 1st day of each and every month thereafter, until full repayment and settlement of said indebtedness, and pay all taxes, assessments, other governmental levies, premiums on insurance and other charges as provided by or under the Charter and By-Laws of said Association and the Deed of Trust securing this Obligation, then this Obligation shall be null and void; otherwise, it shall be and remain in full force and effect.

And it is Further Agreed That each monthly payment made hereunder shall be credited first to insurance and other charges, then on interest on the unpaid balance of the debt, and the remainder to the unpaid principal balance of said indebtedness. Any delinquent payments of principal or interest shall bear the rate of interest herein agreed to until paid.

And it is Further Agreed That, in addition to said monthly payments, said Obligor shall pay to said Association, or its order, monthly, during the time that the indebtedness remains unpaid, an amount equal to one-twelfth (1/12) of the annual taxes, assessments, other governmental levies and insurance premiums on the property conveyed by the Deed of Trust securing the indebtedness evidenced by this Bond.

It is Hereby Further Provided That the stipulated rate of interest on said indebtedness may be increased, at the option of the Association, by not more than one per centum (1%) per annum. However, the Association may not exercise such right in less than three years from the date of these presents and then only upon at least four months' written notice to Borrower, or his heirs, devisees, executors, administrators or assigns, at the last known post office address shown on the books of the Association; and, in the event of such an increase in the stipulated rate of interest, Borrower, or his heirs, devisees, executors, administrators or assigns, may prepay the balance due on said indebtedness within such notice period without the payment of any additional interest or any other penalty.

(over)

ENTERPRISE *Federal* SAVINGS

AND LOAN ASSOCIATION

ORGANIZED MARCH 9, 1889

815 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20004
TELEPHONE 783-8000

OFFICERS
MARTIN A. COOK
President
FRANCIS J. HAYES
Executive Vice President
and Secretary
TIMOTHY A. DUNWORTH
Vice President
and Treasurer
JOSEPH L. CANON
Assistant Secretary-Treasurer
JAMES P. SPELLMAN
Assistant Secretary
EDWIN N. LEWIS
Assistant Secretary
JOSEPH C. DUFF
Assistant Treasurer
WILLIAM B. CONDRO
Assistant Treasurer
P. JOSEPH O'LEARY
Assistant Treasurer

DIRECTORS
GEORGE I. BURGER JR.
THOMAS P. BURKE
MARTIN A. COOK
TIMOTHY A. DUNWORTH
FRANCIS S.F. HANNAN, M.D.
FRANCIS J. HAYES

September 11, 1970

Peter Andresen

3700 Decatur Avenue

Kensington, Maryland 20795

L -14-845

Gentlemen:

In connection with the paid off loan on

Lot 7 Block T Potomac Woods

in the names of Clark-King

Construction Co., Inc.

we enclose the following papers:

- ☑ Deed of Trust (with short form release which you are to record)
- ☐ Executed Deed of Release which you are to record
- ☑ Bond marked Paid and Canceled
- ☐ Hazard Insurance Policy in the amount of $_____, Expiration date_____.
- ☑ Miscellaneous Papers
- ☐ _____
- ☐ _____
- ☐ _____
- ☐ _____

Yours very truly,

James B. Spellman

an amount equal to one-twelfth (1/12) of the annual taxes, assessments, other governmental levies and insurance premiums on the property conveyed by the Deed of Trust securing the indebtedness evidenced by this Bond.

It is Hereby Further Provided That the stipulated rate of interest on said indebtedness may be increased, at the option of the Association, by not more than one per centum (1%) per annum. However, the Association may not exercise such right in less than three years from the date of these presents and then only upon at least four months' written notice to Borrower, or his heirs, devisees, executors, administrators or assigns, at the last known post office address shown on the books of the Association; and, in the event of such an increase in the stipulated rate of interest, Borrower, or his heirs, devisees, executors, administrators or assigns, may prepay the balance due on said indebtedness within such notice period without the payment of any additional interest or any other penalty.

(over)

HANSON & DEN OUTER CIVIL ENGINEERS • LAND SURVEYORS • LAND PLANNING CONSULTANTS

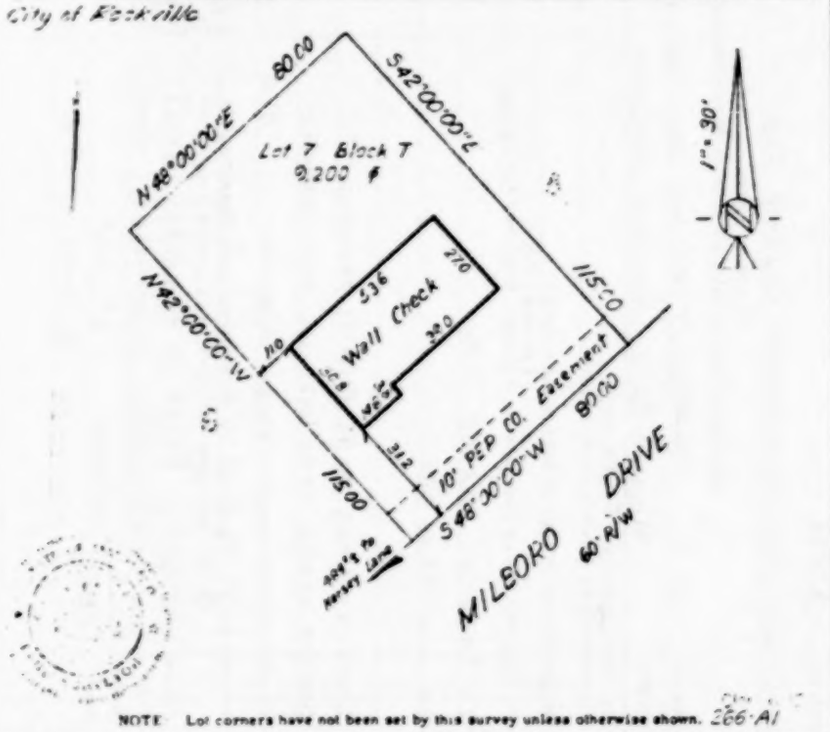
172 ROLLINS AVE., ROCKVILLE, MD. 20852
Phone (301) 427-7070

HOUSE LOCATION SURVEY

LOT 7 BLOCK T
SECTION TEN
POTOMAC WOODS

Montgomery County, Maryland PLAT BOOK 33 PLAT 3873

City of Rockville



NOTE Lot corners have not been set by this survey unless otherwise shown. 266-A1

I hereby certify that the location of the existing improvements shown hereon is correct as made by a transit-tape survey dated ..... and that there are no encroachments either way across property lines unless otherwise shown.

.....
Registered Land Surveyor, Md. No. 392

Sept 12 19 70

ON 10" Montgomery Co. Mh

	120 00	
	30 00	
	10 00	
	85 00	
	1050 00	
	1 00	
		246 00
		1050
	35000 00	35000 00
PURCHASE	62 96 00	$ 36296 00
REFINANCE		
E. F. S. REFINANCE		
OTHER PURPOSES		

LOAN NO. 14-845 — Sept 12 1969

NAME CLARK-KING CONSTRUCTION COMPANY, INC.

IN ACCOUNT WITH
ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION

LOAN ON LOT 7 BLOCK T, "POTOMAC WOODS, SECTION 10" MONTGOMERY CO. MD.

PREMISES: MILBORO DRIVE, ROCKVILLE, MARYLAND

TO CONSTRUCTION INSPECTIONS	120 00		
TO APPRAISAL FEE (Enterprise Federal Savings)	30 00		
TO PREPARATION OF DEED OF TRUST (Thomas F. Burke)	10 00		
TO INSURANCE (Fire and extended coverage) (George I. Borger, Inc.) 1 YR B.R. P.C. 3 yrs $35,000.-	85 00		
TO SERVICE CHARGE 3%	1050 00		
TO NOTARY FEE	1 00		
LOAN CHARGES TO BE PAID AT SETTLEMENT			246 00
SERVICE CHARGE TO BE DEDUCTED FROM ADVANCE			1050 00
BY LOAN (MONTHLY PAYMENT $ 270.20 INTEREST RATE 8 %)			35000 00
BALANCE DUE TO BE PLACED IN CONSTRUCTION LOAN COMMITMENTS ($6000 - TO BE ADVANCED TO PAY OFF EXISTING LAND LOAN)	35000 00		
	$ 36296 00		$ 36296 00

Payment $ 270.20 — PETER C. ANDRESEN, ATTY
Taxes $ —
Insurance $ —
Total $ 270.20 — SETTLEMENT DATE: SEPTEMBER 12 1969
CASE NUMBER 69-328
1st PAYMENT DUE DECEMBER 1, 1970

PURCHASE
REFINANCE
E. F. S. REFINANCE
OTHER PURPOSES

LOANS IN PROCESS — GENERAL LEDGER — LOANS IN PROCESS

ACCOUNT CLARK-KING CONSTRUCTION COMPANY, Inc. ACCOUNT No.

SCHEDULE OF PAYMENTS	DATE	AMOUNT OF LOAN		BALANCE
REFERENCE	DEBITS	CREDITS	DATE	BALANCE
GROUND ADVANCE LOT [redacted]		$ 36,000.00		$ 36,000.00
$ 6,000.00				
1ST FLOOR JOISTS $ 4,000.00				
2ND FLOOR $ 4,000.00				
ROOF ON & PLUMBING ROUGHED-IN $ 4,200.00				
PLASTERED WHITE-COAT $ 5,600.00				
TRIMMED - INCL. TUBS, TOILETS FIXTURES $ 5,600.00				
FINISHED & RELEASE OF LIENS FURNISHED $ 6,600.00				

Lot 6 Block T Section 10 "POTOMAC WOODS", in Montgomery County, Maryland.

ENTERPRISE FEDERAL SAVINGS AND LOAN ASSOCIATION

WASHINGTON, D. C.

balance of principal and interest thereon shall be and become due and payable on said date.

together with all the improvements (specifically including, but not limited to, all awnings, door, window and porch screens, storm windows, mantels, cabinets, linoleum, stoves, shades, venetian blinds, in-a-door beds, elevators, mechanical refrigerators, gas, oil and other fuel burning system and equipment, water heaters, radiator covers, and all plumbing, heating, lighting, cooking, ventilating, cooling, air-conditioning and refrigerating apparatus and equipment, whether in single units or centrally controlled, and each and every of the interior improvements and fixtures movable or immovable of every kind and description upon said land and premises or used in connection therewith, it being agreed and the intention of the parties hereto that the same shall be deemed to be fixtures and an accession to the freehold and a part of the realty, whether or not the same are physically attached thereto, and that the same are specifically covered by this Deed of Trust and included in the term land and premises wherever used herein) now or hereafter erected or placed thereon or therein, together with all rights, ways, easements and appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of, in, to, or out of the said land and premises.

** See endorsement on back page, made a part hereof.

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

PETER C ANDRESEN
GEORGE FRANCIS PAXTON
OF COUNSEL
WILLIAM H MATTHEWS

WASHINGTON OFFICE
SUITE 302
7003 GEORGIA AVE., N W
WASHINGTON, D C 20012

SETTLEMENT STATEMENT FOR Buyer

Property: Lot 13, Block T, Section 10, Potomac Woods **Date** July 17,1972

Mt. Vernon Development Corporation TO:

Young Contracting Co.,Inc. **Case No** 72-242(b)

No liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record unless examination is made. Responsibility is not assumed for any monies due or payable, which at time of settlement are contingent upon assignment of funds not at that time available, said settlement and the payment of proceeds and disbursements hereunder are subject to regard of such assignments. This statement subject to final audit.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT		CREDIT	
Purchase Price or Loan Proceeds	$ 12,000	00	$	
Deposit				
Broker Commission				
– First Mortgage or Trust Given Back			5,000	00
Interest Adjustment				
– Second Mortgage or Trust				
Interest Adjustment				
Adjust State & County (and F.F.B.C.) Tax at $ 136.16			5	92
Adjust Town/Land Tax at $ 138.88			6	08
Adjust Rent at $				
Deposit For Payment Water Bill				
Fire Insurance: Premium ( ) Adjustment ( )				
Tax Certification & Service	2	50		
Loan Commission and Discount				
Inspection/Conveyancing Fee				
Appraisal/Assumption Fee				
Credit Report/Truth in Lending				
Release/Trustee Fee				
Notary Public Fee				
Survey				
Recording & Service: Deed $ 14.00 Mtg. or Trust $ 18.00	32	00		
Release $; $				
Prepare: Deed $; Mtg. or Trust $				
Release $; $				
State Recording Tax Stamps	52	80		
State Transfer Tax	60	00		
County Transfer Tax	120	00		
Title Insurance & Application, Mortgagee & Owners				
Examine Title				
Title Certificate				
Deposit in Escrow for lender:				
Insurance Months				
Taxes Months				
Settlement Charge	50	00		
Balance Due From Buyers by Check			7,305	30
Balance Due To Sellers or Mortgagors				
TOTALS	$ 12,317	30	$ 12,317	30

CERTIFIED TRUE COPY

Approved and Copy hereof received:
Young Contracting Co.,Inc.
By Audrey Young Pres.
(State's Exhibit 3A)

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

PETER C ANDRESEN
GEORGE FRANCIS PAXTON
OF COUNSEL
WILLIAM H MATTHEWS

WASHINGTON OFFICE
SUITE 302
7003 GEORGIA AVE., N W
WASHINGTON, D C 20012

SETTLEMENT STATEMENT FOR Mortgagor

Property: Lot 13, Block T, Section 10, Potomac Woods **Date** July 18,1972

Standard Savings and Loan Association TO:

Young Contracting Co.,Inc. **Case No** 72-242(c)

No liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record unless examination is made. Responsibility is not assumed for any monies due or payable, which at time of settlement are contingent upon assignment of funds not at that time available, said settlement and the payment of proceeds and disbursements hereunder are subject to regard of such assignments. This statement subject to final audit.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

Construction loan - future advances ($52,000.00)	DEBIT		CREDIT	
Purchase Price or Loan Proceeds	$		$	
Deposit				
Broker Commission				
– First Mortgage or Trust				
Interest Adjustment				
– Second Mortgage or Trust				
Interest Adjustment				
Adjust State & County (and F.F.B.C.) Tax at $				
Adjust Town/Land Tax at $				
Adjust Rent at $				
Deposit For Payment Water Bill				
Fire Insurance: Premium (X) Adjustment ( ) Std.	56	00		
Tax Certification & Service				
Loan Commission and Discount				
Inspection/Conveyancing Fee Standard	50	00		
Appraisal/Assumption Fee Standard	50	00		
Credit Report/Truth in Lending				
Release/Trustee Fee				
Notary Public Fee Standard		50		
Conveyancing - A. D. Housley, Esq.	50	00		
Recording & Service: Deed $; Mtg. or Trust $ 18.00	18	00		
Release $; $				
Prepare: Deed $; Mtg. or Trust $				
Release $; $				
State Recording Tax Stamps	228	80		
State Transfer Tax				
County Transfer Tax				
Title Insurance & Application, Mortgagee	145	00		
Examine Title				
Title Certificate				
Deposit in Escrow for lender:				
Insurance Months				
Taxes Months				
Service Charge - Standard - 2%	1,040	00		
Committment Fee - Standard - 1%	607	50		
Settlement Charge	50	00		
Balance Due From Buyers by Check			2,295	80
Balance Due To Sellers or Mortgagors				
TOTALS	$ 2,295	80	$ 2,295	80

CERTIFIED TRUE COPY

Approved and Copy hereof received:
By Young Contracting Co.
Its Secretary-Treasurer
(State's Exhibit 3B)

LIBER 4243 FOLIO 643

- 30 -

72-242(Jo)

MARYLAND CORPORATION DEED OF TRUST — PURCHASE MONEY

This Deed

1972 JUL 19 AM 8: 12

Made this 17th **day of** July **, A. D. 19** 72 **, by and between**

YOUNG CONTRACTING CO., INC.

party of the first part

PETER C. ANDRESEN AND LORI J. HALL, Trustees,

party of the second part:

Whereas, the said party of the first part is justly indebted unto MT. VERNON DEVELOPMENT CORPORATION **in the full sum of** FIVE THOUSAND AND NO/100----------**Dollars** with interest thereon at the rate of eight (8%) per centum per annum, said interest only payable quarterly, for which amount the said party of the first part has executed and delivered its one (1) promissory note, payable to Mt. Vernon Development Corporation. The entire balance of unpaid principal and interest shall all become due and payable one (1) year from the date hereof, anything to the contrary above notwithstanding.

Prior to the execution and delivery of any partial or complete release, each Trustee shall be entitled to charge and receive a fee of $10.00 plus 50¢ for notary fees for each release. The right to charge and receive said fee shall be limited to two (2) trustees.

The Trustees are hereby directed to subordinate the lien hereof, without prior approval from the noteholder, to one bona-fide construction loan on the said property or any part thereof.

And Whereas, *the party of the first part desires to secure the prompt payment of said debt, and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, including reasonable counsel fees incurred or paid by the said, party of the second part or substituted trustees, or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and all money which may be advanced as provided herein, with interest on all such costs and advances from the date hereof.*

Now, Therefore, This Indenture Witnesseth, *that the party of the first part, in consideration of the premises, and of one dollar, lawful money of the United States of America, to it in hand paid by the party of the second part, the receipt of which, before the sealing and delivery by these presents, is hereby acknowledged, has granted, and do hereby grant unto the party of the second part all of the following described land and premises, situate in the* county of Montgomery, State of Maryland *known and distinguished as* follows:

[A copy of this document was admitted as part of State's Exhibit 45 from George Young's records. (Tr. 491-492.)]

[State's Exhibit 30]

- 31 -

LIBER 4243 FOLIO 648

STATE OF Maryland
COUNTY OF Montgomery

On this the 17th *day of* July *, 19* 72 *, before me,* LORI HALL *the undersigned officer, personally appeared* Audrey E. Young *, who acknowledged* herself *to be the* President *of* Young Contracting Co., Inc. *a corporation, and that* she *, as such* President *, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by* herself *as* President.

IN WITNESS WHEREOF *I hereunto set my hand and official seal.*

Lori Hall
LORI HALL — Title of Officer

I, George Young
Young Contracting Co., Inc. , Secretary of

do hereby certify that the aforegoing deed of trust was executed in strict conformity with a resolution of the Board of Directors *of the said* Young Contracting Co., Inc. *a corporation organized under the laws of* Maryland *passed at a duly called meeting of said corporation, held on* July 17 *, 19* 72.

George Young
George Young *Secretary.*

XXXX

NOTICE TO AND STATEMENT OF BUYER

Required by the Acts of the General Assembly of Maryland 1971. To be codified as Article 48A - Section 486-1.

Property: **Lot 13, Block T, SECTION 10, POTOMAC WOODS,**

MONTGOMERY COUNTY, MARYLAND.

In connection with the purchase of the captioned property, Peter C. Andresen, Attorney at Law has notified me/us of the following:

1. A mortgagee title insurance policy will be issued to:
Standard Savings & Loan Association of Gaithersburg
in the face amount of the loan which is $ 52,000.00

2. That no protection is afforded the buyer under a mortgagee title insurance policy.

3. That the buyer has the right to obtain in his own favor simultaneous title insurance in the form of an owners title insurance policy in the face amount of the purchase price for the property, by paying an additional premium or charge of $_____.

4. That the buyer's title insurance will be issued subject only to the contingencies and conditions contained in the binder, title report and policy.

5. That the buyer has the right to review a sample of the form of the owners title insurance policy in which said contingencies and conditions shall be inserted.

6. That the owners title insurance policy, if desired by the buyer, will be effective upon payment of premium, subject only to the delivery and recording of the Deed from the Seller to the Buyer.

I/we hereby acknowledge receipt of this Notice, prior to the disbursement of any funds and I/we do hereby make the following election with regard to the purchase of an owners title insurance policy, viz:

( ) Desire to obtain an owners' title insurance policy

(✓) Do not desire to obtain an owners' title insurance policy

Witness:

_____ (_____) Young Continuity Co., Inc.
Date By: Andrew Young
Buyer, his Agent or Attorney

(_____) _____
Date Buyer, his Agent or Attorney

[State's Exhibit 3D]

NOTICE TO AND STATEMENT OF BUYER

Required by the Acts of the General Assembly of Maryland 1971. To be codified as Article 48A - Section 486-1.

Property: **Lot 13, Block T, SECTION 10, POTOMAC WOODS,**

MONTGOMERY COUNTY, MARYLAND.

In connection with the purchase of the captioned property, Peter C. Andresen, Attorney at Law has notified me/us of the following:

1. A mortgagee title insurance policy will be issued to:
Standard Savings & Loan Association of Gaithersburg
In the face amount of the loan which is $ 52,000.00

2. That no protection is afforded the buyer under a mortgagee title insurance policy.

3. That the buyer has the right to obtain in his own favor simultaneous title insurance in the form of an owners title insurance policy in the face amount of the purchase price for the property, by paying an additional premium or charge of $_____.

4. That the buyer's title insurance will be issued subject only to the contingencies and conditions contained in the binder, title report and policy.

5. That the buyer has the right to review a sample of the form of the owners title insurance policy in which said contingencies and conditions shall be inserted.

6. That the owners title insurance policy, if desired by the buyer, will be effective upon payment of premium, subject only to the delivery and recording of the Deed from the Seller to the Buyer.

I/we hereby acknowledge receipt of this Notice, prior to the disbursement of any funds and I/we do hereby make the following election with regard to the purchase of an owners title insurance policy, viz:

( ) Desire to obtain an owners' title insurance policy

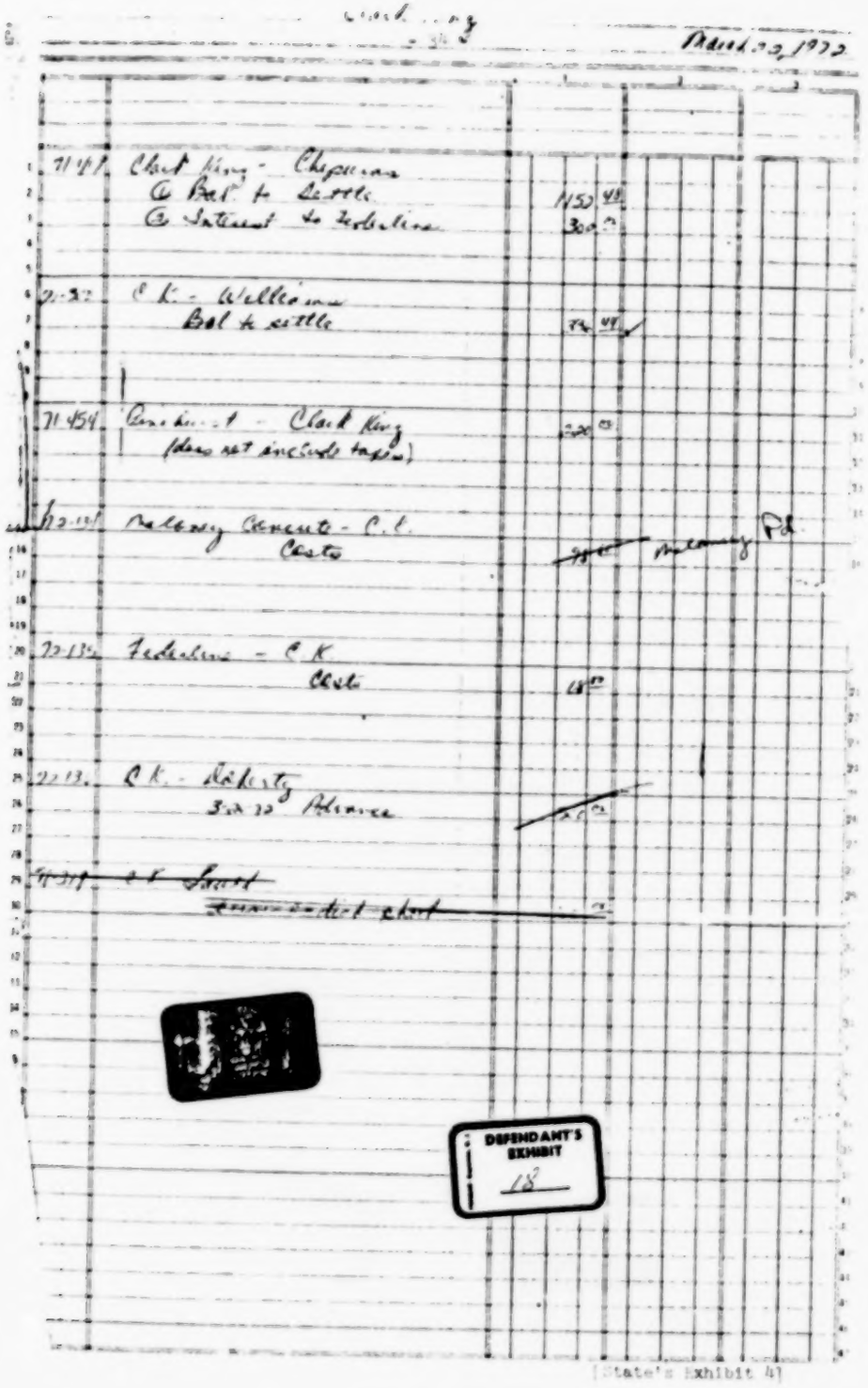
(✓) Do not desire to obtain an owners' title insurance policy

Witness:

_____ (_____) Young Continuity Co., Inc.
Date By: Andrew Young
Buyer, his Agent or Attorney

(_____) _____
Date Buyer, his Agent or Attorney

[State's Exhibit 3E]



[State's Exhibit 4]

LIBER 4210 FOLIO 847 72-165(ja)

- 35 -

CLERK'S OFFICE MONTG. CO., MD.

MARYLAND CORPORATION DEED OF TRUST

This Deed

1972 MAY -5 AM 11:24

Made this 27th **day of** March **, A. D. 1972 , by and between**

CLARK-KING CONSTRUCTION CO.,INC.,

party of the first part

DEFENDANT'S EXHIBIT 19

PETER C. ANDRESEN AND WI[illegible] as Trustees,

party of the second part:

Whereas, CLARK-KING[illegible]STRUCTION CO.,INC.

justly indebted unto F. O. DAY,INC. **in the full sum of** FORTY-NINE THOUSAND AND NO/100----------**Dollars** as evidenced by one (1) promissory note of even date herewith due and payable one (1) year after date.

The trustees hereunder are hereby authorized and directed to release from the lien hereof the hereinafter described lots upon the payment of the sum of $7,000.00 upon the principal sum due on the debt secured hereby for each lot to be released.

Prior to the execution and delivery of any partial or complete release, each trustee shall be entitled to charge and receive a fee of $10.00 plus 50¢ for Notary fees for each release. The right to charge and receive said fee shall be limited to two (2) trustees.

PART OF THIS DEED OF TRUST SECURES A PRE-EXISTING DEBT IN THE AMOUNT OF $37,000.00 UPON WHICH THE RECORDING TAX WAS PAID AT LIBER 3934, FOLIO 772. THEREFORE RECORDING TAX IS DUE ONLY ON $12,000.00.

MAY-5-72 [illegible] C.K.Cl.R.C. —PRIVATE 52.

MAY-5-72 [illegible] C.K.Cl.R.C. MDT —ADX 17.

And Whereas, *the party of the first part desires to secure the prompt payment of said debt, and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, including reasonable counsel fees incurred or paid by the said, party of the second part or substituted trustee, or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and all money which may be advanced as provided herein, with interest on all such costs and advances from the date her*

Now, Therefore, This Indenture Witnesseth, *that the party of the first part, in consideration of the premises, and of one dollar, lawful money of the United States of America, to it in hand paid by the party of the second part, the receipt of which, before the sealing and delivery by these presents, is hereby acknowledged, has granted, and do hereby grant unto the party of the second part* all of *the following described land and premises, situate in the* County of Montgomery, State of Maryland *known and distinguished as* follows:

[illegible]

[A certified copy of this document was admitted from the land records of Montgomery County as part of State's Exhibit 36. (Tr. 290-291.)

This document was introduced as evidence of the failure to pay recording taxes and of the misrepresentation of a taxable consideration as charged in Counts 16 and 17 of the Indictment. These charges were abandoned by the State. (Pet. App. A. 35-36.)]

[State's Exhibit 19A]

Lots numbered One (1) through Seven (7) inclusive in Block numbered One (1) in the subdivision known as KENDALE, as per plat recorded in Plat Book 89 at Plat 9562, among the Land Records of Montgomery County, Maryland.

This is to certify that this instrument was prepared under my supervision, and that I am a member in good standing of the Bar of the Court of Appeals of Maryland.

Peter C. Andresen

together with all the improvements in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the party of the first part, of, in, to, or out of the said land and premises.

In and Upon the Trusts, Nevertheless, *hereinafter declared; that is to say:*
IN TRUST to permit said party of the first part,

its successors or assigns, to use and occupy the said described land and premises, and the rents, issues, and profits thereof, to take, have, and apply to and for its sole use and benefit, until default be made in the payment of said promissory note *hereby secured or any installment of interest thereon, when and as the same shall become due and payable, or any proper cost or expense in and about the same as hereinafter provided.*

And, *upon the full payment of all of said note and the interest thereon, and all moneys advanced or expended as herein provided, and all other proper costs, charges, commission, half-commissions and expenses, at any time before the sale hereinafter provided for to release and reconvey the said described premises unto the said* party of the first part *its successors or assigns, at* his, her, its or their *cost.*

And Upon This Further Trust, *upon any default or failure being made in the payment of* said note *or of any installment of principal or interest thereon, when and as the same shall become due and payable, or upon default being made in the payment, after demand therefor, of any money advanced as herein provided for, or of any proper cost, charge, commission, or expense in and about the same, then and at any time thereafter the said party of the second part or the trustee acting in the execution of this trust shall have the power and it shall be* their *or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcels, at such time and place, and after such previous public advertisement as the party of the second part or the trustee acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost, of the purchaser, or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales:* FIRSTLY, *to pay all proper costs, charges, and expenses, including all*

fees and costs herein provided for, and all moneys advanced for any bond, taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of 5 *per centum on the amount of the said sale or sales;* SECONDLY, *to pay whatever may then remain unpaid of said* promissory note, *whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said note shall, upon such sale being made before the maturity of said note, be and become immediately due and payable at the election of the holder thereof; and,* LASTLY, *to pay the remainder of said proceeds, if any there be, to said* party of the first part *its successors or assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.*

And, *the said* party of the first part does *hereby agree at its own cost, during all the time wherein any part of the matter hereby secured shall be unsettled or unpaid to keep the said improvements insured against loss by fire in the full* principal sum *in the name and to the satisfaction of the party of the second part, or substituted trustee, in such fire insurance company or companies as the said party of the second part may select, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether due or not, unless the party entitled to receive shall waive the right to have the same so applied; and also to pay all taxes and assessments, both in general and special, that may be assessed against, or become due on said land and premises during the continuance of this trust and that upon any neglect or default to so insure, or to pay taxes and assessments, any party hereby secured may have said improvements insured and pay said taxes and assessments, and the expenses thereof shall be a charge hereby secured and bear interest at the rate of six per centum per annum from the time of such payment.*

And, *it is further agreed that if the said property shall be advertised for sale, as herein provided and not sold, the trustee or trustees acting shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.*

And, *the irrevocable power to appoint a substitute trustee or trustees is hereby expressly granted to the party secured hereby, its successors and assigns, to be exercised at any time hereafter without notice and without specifying any reason therefor, by filing for record in the office where this instrument is recorded a deed of appointment. The party of the first part and the Trustee herein named, or that hereafter may be substituted hereunder, expressly waives notice of the exercise of this power and the giving of bond by any Trustee, as well as any requirement for application to any court for the removal, appointment or substitution of any Trustee hereunder.*

And, *the said party of the first part covenants and agrees that he will pay the indebtedness, as hereinbefore provided.*

And, *the said party of the first part covenants that it will warrant specially the land and premises hereby conveyed, and that it will execute such further assurances of said land as may requisite or necessary.*

In Testimony Whereof *the said* Clark-King Construction Co., Inc. *hath on the* 27th *day of* March, *A. D. 19* 72, *caused these presents to be signed by* MELVIN L. CLARK *its* President *attested by* JOANNE K. CLARK *its* Secretary *and its corporate seal to be hereunto affixed, and doth hereby appoint* MELVIN L. CLARK *its true and lawful attorney in fact to acknowledge and deliver these presents as its act and deed.*

CLARK-KING CONSTRUCTION CO., INC.

By Melvin L. Clark (SEAL)
MELVIN L. CLARK, JR. President

[CORPORATE SEAL]

Attest:

Joanne K. Clark
JOANNE K. CLARK Secretary.

Signed, sealed and delivered in the presence of—

Lynne Feigler
30 LYNNE FEIGLER

LIBER 4210 FOLIO 850

STATE OF MARYLAND
COUNTY OF MONTGOMERY

On this the 27th day of March , 19 72. before me, JO LYNNE PEIGLER the undersigned officer, personally appeared MELVIN L. CLARK, JR. , who acknowledged himself to be the PRESIDENT of CLARK-KING CONSTRUCTION CO., INC. a corporation, and that he, as such officer , being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as President.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

My commission expires July 1, 1974 Jo Lynne Peigler
Title of Officer JO LYNNE PEIGLER

I, JOANNE K. CLARK
CLARK-KING CONSTRUCTION CO., INC. , Secretary of

do hereby certify that the aforegoing deed of trust was executed in strict conformity with a resolution of the Board of DIRECTORS of the said CLARK-KING CONSTRUCTION CO., INC.

a corporation organized under the laws of MARYLAND passed at a duly called meeting of said corporation, held on March 27 , 19 72 .

Joanne K Clark
Joanne K. Clark Secretary.

Subscribed and sworn to before me this 27th day of March 19 72

My commission expires July 1, 1974 Jo Lynne Peigler
JO LYNNE PEIGLER, Notary Public

Corporation Deed of Trust

651

CLARK-KING CONSTRUCTION CO., INC.

TO

PETER C. ANDERSEN AND WILLIAM B. WHEELER

Trustees

Recorded for Record as the 27th day of May A.D. 1972 at 11:24 o'clock A.M. and recorded in Liber No. 4210 at Folio 847, one of the Land Records for Montg. Co., Md. and examined by

Howard M. Lampell Clerk

Filed by PETER CHRISTIAN ANDERSEN ATTORNEY AT LAW 8700 DECATUR AVENUE KENSINGTON MARYLAND

STATE OF MARYLAND
COUNTY OF MONTGOMERY

On this the 27th day of March ,1972, before me, JAMES W. HAYNES , the undersigned officer, personally appeared ATLEE HITCHEN , and made oath in due form of law that he is TREASURER of the party secured by the foregoing deed of trust (the "Beneficiary"), and that the consideration recited in said deed of trust is true and bona fide as therein set forth, and in like manner affirms that he is agent for the within party secured by this deed of trust and that he had authority to make this affidavit.

IN WITNESS WHEREOF I have hereunto set my hand and official seal. Witness

James W. Haynes Notary Public Title of Officer

My Comm exp 7/1/74

Peter Christian Andersen

Filed for Record in Liber 4210 Folio 847 Land Records of Montgomery County, Md. This 27th day of May 1972 at 11:24 A.M. Howard M. Lampell Clerk

Filed May 1, 1973 9. Thomas

9/26/72

To T. C. Dwg Co. Inc.

Regarding note secured by deed of trust on Lot 16, Block 5, Potomac Woods Subdivision, Montgomery County, Md.:

In the event said lot is sold and proceeds are insufficient to pay the balance due of $2,000.00 plus accrued interest I will pay the said $2,000.00 plus interest thereon upon assignment of the note to me.

Said lot to be sold in approximately 40 days from date.

Peter Andersen

Peter Andersen

[State's Exhibit 20A]

NAME Peter Andresen W.D.

ALIAS

D.O.B. 11/6/25 RACE White SEX Male HEIGHT 5'11" WEIGHT 170

1. FULL NAME Peter Christian Andresen DATE Nov. 6, 1972
2. ADDRESS 296 Grenfell Cir CITY Silver Spring STATE Md
3. PLACE OF BIRTH Washington, D.C. DATE OF BIRTH 11/6/25
4. LIST SCHOOLS ATTENDED Woodrow Wilson High School
5. LIST ALL OCCUPATIONS Lawyer
6. PRESENT EMPLOYER Self ADDRESS 7910 Woodmont Ave
7. PREVIOUS EMPLOYER Penfield Co. ADDRESS 7910 Woodmont Ave. Bethesda, Md.
8. NAME OF NEAREST RELATIVE Carol Andresen RELATIONSHIP Wife
9. ADDRESS OF NEAREST RELATIVE Same
10. HAIR Brown COLOR EYES Blue HEIGHT 5'10" WEIGHT 182 COMPL Fair GLASSES —
11. IN EMERGENCY NOTIFY Wife
12. ADDRESS Same PHONE NUMBER 588-9[illegible]
13. PRINT ALPHABET - CAPITALS A B C D E F G H I J K L M N O P Q R S T U V W X Y Z
14. PRINT ALPHABET - SMALL LETTERS a b c d e f g h i j k l m n o p q r s t u v w x y z
15. MOTOR VEHICLE PERMIT NUMBER 234 875 838 25 SOCIAL SECURITY NUMBER 538-46-2582
16. WRITE—DO NOT PRINT THE FOLLOWING MATERIAL ARE YOU RIGHT OR LEFT HANDED Right
17. MR. JOHN B. CASH Mr John B. Cash MRS. DORIS E. FRANK Mrs Doris E. Frank
18. DR. GEORGE H. ARTHUR Dr. George H. Arthur LEWIS KING, INC. Lewis King Inc

Peter Andresen
Joanne Ziegler
Carol Simms
Nora Hall
John Swain
William Matthews
Robert Sampson

D. Young file

Andresen

He will go with me to sign & then this file. To do so

[Only one of the four known handwriting samples is reproduced herein. None of the known handwriting samples were seized. (Tr. 470.)]

[State's Exhibit 20B]

STATE'S ATTORNEY FOR MONTGOMERY COUNTY
ANDREW L. SONNER
STATE'S ATTORNEY FOR PRINCE GEORGE'S COUNTY
ARTHUR A. MARSHALL, JR.

Bi-County Major Frauds Unit
State's Attorney for Montgomery County
State's Attorney for Prince George's County
Suite 309
8641 Colesville Road
Silver Spring, Maryland 20910

(301) 565-8180

DIRECTOR AND ASSISTANT STATE'S ATTORNEY
JEFFREY RUSSELL WERNER

[redacted]

This unit requests assistance from your questioned documents section in reference to the attached documents. We are trying to ascertain if Peter C. Andresen's handwriting or handprinting appears on the documents in question.

Document #1	Handwriting card with known exemplars of Peter C. Andresen's handwriting.
Documents # 2,3,64	Yellow legal paper with known exemplars of Peter C. Andresen's handwriting

Following are all questioned Documents

The following documents taken from a file labeled Antonelli to Mount Vernon to Young Contracting Co. 72-242.

Document #5	All handwriting and handprinting
Document #6	Handprinting
Document #7	All handwriting and handprinting
Document #8	All handwriting and handprinting
Document #9	All handwriting and handprinting
Document #10	All handwriting and handprinting
Document #11	All handwriting and handprinting

[This document was not seized from petitioner's law office, but rather is a request for handwriting analysis from the Bi-County Frauds Unit. (Tr. 470.)]

[State's Exhibit 20C]

Document #12 All handwriting and handprinting

Document #13 Signature

Document #14 Initials

Document #15 All handwriting and handprinting

The following items taken from a file labeled Clark-King to Antonelli 69-351 13(T).

Document #16 All handwriting and handprinting

Document #17 Handwriting and Initials

Document #18 All handwriting and printing

Document #19 All handwriting and printing

Document #20 All handwriting and printing

Document #21 Handwriting and Initials

Document #22 (Cliped to inside of file) - Handwriting and printing on both sides.

Document #23 All handwriting and printing

The following documents taken from the file labeled Clark-King to Holtzclaw 70-307 7(T) P.W.

Document #24 All handwriting and handprinting

Document #25 All handwriting and handprinting

Document #26 All handwriting and handprinting

Document #27 All handwriting and handprinting

Document #28 Handwriting and initials

The following documents taken from file labeled State National Bank (N.B.) to Clark-King 69-128, 11, 12, 13 (S)

Document #29 All handwriting and printing

Document #30 All handwriting and printing

Document #31 All handwriting and printing

Document #32 All handwriting and printing

Document #33 All handwriting

The following documents taken from file labeled Clark-King to Chepuras (2) (11) HCA PK 71-409

Document #34 All handwriting and handprinting

Document #35 All handwriting and handprinting

Document #36 All handwriting and handprinting

Document #37 All handwriting and handprinting

The following documents taken from file labeled Pinehurst to Clark-King 71-454

Document #38 The 3rd sheet marked attorney's final report (all writing and printing)

The 4th sheet yellow in color (signature and writing)

Document #39 (Found on outside of file) all printing and handwriting

Document #40 (found on outside of file) printing and handwriting

The following documents taken from file labeled Pinehurst to Clark-King 70-129

Document #41 Initials

Document #42 Initials

Document #43 Printing and writing

Document #44 Printing and writing

Document #45 Yellow legal paper with known exemplars of Peter C. Andresen's handwriting

(#5)

Defendant's Exhibit No. 5

Agreement made this June 16th, 1937

Between Liberia Development Corp.

and Tillman

Dollars ($ 1.00)

as the sum of Ten & no/100

in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the purchase of Lot 13 in Block 1

Section 1, Liberia, Montgomery County, Md., with improvements thereon, as per plat of said subdivision recorded among the land records of Montgomery County, Md., and the sum of Dollars ($) to be paid as hereinafter mentioned, the said party of the first part hereby agrees to sell and convey unto the said party of the second part, his heirs and assigns, in fee simple, by proper deed of special warranty, free and clear of all liens and encumbrances except taxes for the current year, which are to be adjusted as of the date hereof, and except as hereinafter mentioned, the following described property, situate in Montgomery County, Maryland, to wit:

Lot 13 in Block 1 Section 1, Liberia, Montgomery County, Md.

upon the following terms and conditions, to wit:

Total Price of Property Twenty Seven Hundred and No/100 Dollars ($ 2700.00)

The Purchaser agrees to pay Seven Hundred and No/100 Dollars ($ 700.00)

cash on the date of conveyance, of which $ 10.00 has been paid as earnest money, receipt of which is hereby acknowledged, and which said earnest money deposit shall be a part of the cash payment above mentioned.

2. The Purchaser is to have and take the property subject to a first deed of trust to be executed by the Purchaser to secure the sum of $ 2000.00 payable in the manner following, to wit: Interest only at the rate of 6% per annum payable semi-annually for a period of one year from date hereof, and the principal sum of $2000.00 at the end of one year from date hereof, with interest at the rate of 6% per annum payable semi-annually from date hereof until paid, and the Purchaser agrees to execute and deliver to the Seller a first deed of trust to secure the same, containing the usual covenants and conditions, and to pay all recording taxes and charges thereon.

(If a purchase provides for the assumption of a loan, it is understood that the balance set forth above is an approximate balance)

3. The balance of deferred purchase money amounting to $ None is to be secured by a second deed of trust on said premises to be paid in monthly installments of $ or more, at maker's option including interest at the rate of per cent per annum on unpaid installments when so paid to be applied first to the payment of interest on the amount of principal remaining unpaid and the balance thereof credited to principal, which deed of trust the Seller agrees to accept as a part of the purchase price. In case of default in any payment, the entire amount then remaining unpaid, shall immediately become due and payable. Trustees in said deeds of trust are to be named by the party secured thereby.

Proceeds of Loan to be advanced into Construction loan. Subject to purchaser obtaining loan of not less than 80% of cost of construction loan. Subject to purchaser obtaining building permit. Subject to accepted deed of trust and note for 80% of construction cost not exceeding $3000.00 Cash if title is found defective and is not remedied as aforesaid, the Purchaser hereby agrees to pay any abstracting and also to pay to the Agent herein the brokerage fee hereinafter provided for just as though the sale had actually been consummated and all the terms of this contract complied with.

4. TITLE. The property, or the conveyance thereof, is sold free of encumbrances except as aforesaid. Title is to be good and marketable, subject, however, to mortgages, conditions and restrictions of record, if any; otherwise the deposit is to be returned and sale void at the option of the Purchaser, unless the defect is one of such character that there may be removed by legal action within a reasonable time, but the Seller and Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case proceedings at law or otherwise be necessary to perfect the title, such action must be taken promptly by the Seller at his own expense, whereupon the time herein provided for full settlement by the Purchaser will thereby be extended for the same length of time for such prompt action.

5. COSTS. Property is to be conveyed in the name of Individual Use Purchaser. and the Purchaser hereby authorizes and Agent to order the preparation of all necessary conveyancing papers through Peter, Berens, Kennedy & Shaw Attorney, and agrees to pay the ordinary charges in connection therewith, tax certificate, transfer tax, conveyancing, notary fees, survey where required, state revenue stamps if any, all recording charges except those incident to releasing existing encumbrances (including those for any purchase money trust, provided, however, that if upon examination the title should be found defective and it is not remedied as aforesaid, the Seller hereby agrees to pay) any abstracting and also to pay to the Agent herein the brokerage fee hereinafter provided for just as though the sale had actually been consummated and all the terms of this contract complied with.

6. SETTLEMENT. Within Five days from date of acceptance hereof by the Seller, or as soon thereafter as a report of the title can be secured if promptly ordered, and/or survey, if required, and/or Governmental insured loan, if used, can be procured, if promptly applied for, the Seller and Purchaser are required and agree to make full settlement in accordance with the terms hereof. If the Purchaser shall fail to make full settlement, the deposit herein provided for may be forfeited at the option of the Seller, in which event the Purchaser shall be released from further liability hereunder unless the Seller notifies the Purchaser and the Agent in writing within 20 days from the date provided for settlement hereof of his election to avail himself of any legal or equitable rights other than the said forfeiture, which he may have under this contract. In the event of the forfeiture of the deposit, the Seller shall allow the Agent one-half thereof as a compensation for his services, but amount not to exceed the amount of the full brokerage fee.

7. Settlement is to be made at the office of the Attorney, or the Title Company searching the title. Deposit with the Attorney or with the Title Company of the cash payment as aforesaid, the deed of conveyance for execution and such other papers as are required of either party by the terms of the contract shall be considered good and sufficient tender of performance of the terms hereof. It is agreed that, if required, a portion of the purchase price may be used at settlement to pay off any existing encumbrances.

8. ADJUSTMENTS. Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted as the date of transfer. Taxes, general and special, are to be adjusted according to the certificate of taxes issued by the collector of taxes. If any assessments have been made for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, same shall be paid by the seller or allowance made therefor at the time of transfer. If the property is serviced by the Washington Suburban Sanitary Commission or a local equivalent, annual benefit charges or said Commission or local government are to be adjusted as of date of transfer and assumed thereafter by Purchaser.

9. Seller agrees to convey title and deliver a good and sufficient special warranty deed, and to pay for Federal revenue stamps on the deed.

10. The risk of loss or damage to said property by fire or other casualty until the deed of conveyance is recorded is assumed by the Seller.

11. FHA GUARANTEED LOAN. The provisions of this paragraph apply only where the Purchaser is buying with an FHA guaranteed loan. It is expressly agreed that, notwithstanding any other provisions of this contract, the Purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Seller has delivered to the Purchaser a written statement issued by the Federal Housing Commissioner setting forth the appraised value of the property (excluding closing costs) of not less than $ which statement the Seller hereby agrees to deliver to the Purchaser for the purpose of obtaining such commitment. The Purchaser shall have the right to waive any appraised valuation in excess of the sales price herein agreed to be paid by the Purchaser. The contract subject to FHA and VA approval.

12. VETERANS REHABILITATION GUARANTEED LOAN. In the event that the Buyer, who is purchasing the property, is a Veteran and is using a Veterans Administration guaranteed loan, it is understood that this contract is contingent on the approval of the Veterans Administration and the Lending Institution. If the aforesaid approval is not obtained it is expressly agreed that the same be rendered null and void and the contract ceases to exist and void.

13. Purchaser or FHA or VA approved mortgagee agrees to make prompt application for mortgage loan and file all necessary papers that are required of him to complete proceedings and agrees that the Seller or he or she shall have the right to forfeit the deposit.

14. Both Purchaser and Seller agree to pay FHA or VA closing costs, on FHA and VA guaranteed loans, and I agree to comply with FHA or VA requirements where applicable.

15. If a new FHA or VA loan is to be placed under this contract, the Purchaser agrees to pay a loan placement fee of 1% of the original face of the loan, and the Seller agrees to pay a loan placement fee of 1% of the original face of the loan. There is no placement fees are based on the principal mortgage loans and it is further agreed that the Seller will negotiate such loan placement charge in said loan placement charges as the same shall exist at the time of settlement under the contract at the time of settlement in the ordinary course of business.

16. Possession: Seller agrees to give possession and occupancy at time of settlement, and in the event he shall fail so to do he shall become a tenant at sufferance of the Purchaser and hereby waives all notice to quit, as provided for by the laws of the State of Maryland, and agrees to pay as rent for the use and occupancy of said premises the sum of $ per day, and the Purchaser shall have the right to enter upon said premises and remove all persons and chattels therefrom, and the Seller hereby waives all claim for damages by reason of such entry and removal. Seller agrees to keep and maintain the premises in the present condition, reasonable wear and tear excepted, and to keep all plumbing, heating and electrical equipment in good working order. Seller agrees to maintain fire and extended coverage insurance in the amount of the purchase price herein agreed to be paid by the Purchaser at the time of settlement, and to assign the policy to the Purchaser at the time of settlement.

17. This contract shall be binding upon the parties hereto, their heirs, personal representatives and assigns, and shall not be recorded by any party hereto, or by any one acting for any party hereto, without the written consent of the other party hereto, and any violation of this provision shall, at the option of the party not in default, render this contract null and void. This contract contains the entire agreement between the parties hereto and it is agreed that all representations and inducements made prior to the execution of this contract are merged herein. This contract shall not be altered, amended, changed or modified except in writing executed by the parties hereto. This contract shall be governed by the laws of the State of Maryland, and any action hereunder may be brought in any court of competent jurisdiction in said State.

18. Settlement to be made on or before Sept 1st, 1937, unless mortgage commitment is delayed, in which case settlement shall be made within 10 days after receipt of such commitment, but in no event later than Dec 1st, 1937, unless extended by mutual agreement in writing.

19. Time is of the essence of this contract. Any extension of the time for any payment hereunder or any modification of any other provision hereof shall not operate as a waiver of the time for any other payment or of any other provision.

20. Any notice required or permitted to be given hereunder shall be sufficient if given by or to the attorney for the respective party.

21. Broker's Commission: Seller agrees to pay Ernest Kennedy Associates, Inc. a commission fee for services rendered amounting to Six Hundred & No/100 of such commission to be paid out of the proceeds of settlement and charged to the Seller on the settlement sheet. Seller hereby irrevocably assigns to said Broker so much of the purchase money as may be necessary to pay said commission, and hereby authorizes and directs the Attorney conducting settlement to pay said commission out of the proceeds of settlement. Seller hereby agrees that in the event of default by Seller in the performance of this contract, Seller will pay to said Broker a commission on the basis aforesaid on the amount of the purchase price herein agreed to be paid by the Purchaser, and Seller hereby authorizes and directs the Attorney conducting settlement to pay said commission out of the proceeds of settlement. Seller hereby agrees that in the event of default by Seller in the performance of this contract, Seller will pay to said Broker a commission on the basis aforesaid on the amount of the purchase price herein agreed to be paid by the Purchaser, and Seller hereby authorizes and directs the Attorney conducting settlement to pay said commission out of the proceeds of settlement.

Ernest Kennedy Associates, Inc.

By: [illegible]
Duly Authorized Agent

Witness our hands and seals the day and year first above written.

[illegible] Liberia Development Corp.

[illegible]

[State's Exhibit 20D]

(#6)

Standard Charges

Notary Fee	50¢
Insp. Fee	50.00
1% Comm. Fee	607.50
2% Perm. Fee	1040.00
Appraisal Fee	50.00
Preparation Papers	50.00

Document #6
J.J. Brown

BEST COPY AVAILABLE

(#7)

Closes Standard Law
settle Tuesday at 4:30 p.m.
7/18

Case No. 72-24x

Name of Maker: ~~SECOND TRUST~~ Young Contracting Co., Inc.

Name of Lender: [illegible]

"Bearer" Paper: Yes___ No X

Address: Executive Blvd., Rockville, Md.

Legal: Lot 13, Blk T, Sec. 10 PW County Mont

Note

Gross: 5,000.00

Net: same

~~Quarterly~~ Payments: Interest Only

Term: 1 year

Interest Rate: 8%

Interest Rate Agreement Yes___ No—

Federal Forms Yes___ No—

Recision Notice Yes___ No—

Maryland Forms Yes___ No—

Taker: PC&T LTH, Trustees

Remarks:

James
Subordinate to one bona fide construction loan
Release clause 10%

Delivered to J. S. James

(#8) 1-3

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3706 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3366

PETER C. ANDRESEN
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 202
7053 GEORGIA AVENUE N.W.
WASHINGTON, D.C. 20012

SETTLEMENT STATEMENT FOR Mortgagor

Property: Lot 13, Block T, Sec. 10 Potomac, Md. Date July 7, 1972

Standard Savings and Loan Assn. 1st Trust

Young Contracting Co., Inc. Case No. 72-24x (c)

Reliability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record unless examination is made. Responsibility is not assumed for the correctness of the calculations of any of settlement are contingent upon collection of funds not at such time available. Title insurance and settlement and the payment of proceeds and disbursements [illegible] to recordation of [illegible] the title insurance company and may involve a portion of said premium as its commission.

	DEBIT	CREDIT
Construction loan - future advances Purchase Price or Loan Proceeds	$	$
Deposit		
Broker Commission		
– First Mortgage or Trust		
Interest Adjustment		
– Second Mortgage or Trust		
Interest Adjustment		
Adjust State & County (and F.F.B.C.) Tax at $.		
Adjust Town/Land Tax at $.		
Adjust Rent at $.		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( )		
Tax Certification & Service		
Loan Commission and Discount		
Inspection/~~Conveyancing~~ Fee Standard	50.00 ✓	
Appraisal/~~Assumption~~ Fee Standard	50.00 ✓	
Credit Report		
Release/Trustee Fee		
Notary Public Fee Standard	.50 ✓	
Survey Conveyancing – A.D. Hamilton Co.	50.00 ✓	
Recording [illegible] Mtg. or Trust $ 22—	18.00	
Release $. ; $.		
Prepare: Deed $. ; Mtg. or Trust $.		
Release $. ; $.		
State Recording Tax Stamps	228.50 ✓	
State Transfer Tax		
County Transfer Tax	145.00 ✓	
Title Insurance & Application, Mortgagee [illegible]		
Examine Title		
Title Certificate		
Deposit in Escrow for lender:		
Insurance Months		
Taxes Months	1,260.30 ✓	
Mont. Co. Taxes – Standard – 2%	307.50 ✓	
Mont. Co. Taxes – Standard – 1%		
	50.00 ✓	
Settlement Charge		4,239.50 ✓
Balance Due From Buyers by Check		
Balance Due To Sellers or Mortgagors		
TOTALS	$ 2,239.50	$ 2,239.50

CERTIFIED TRUE COPY

Approved as Copy Interest received
Young Contracting Co., Inc.

T2

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3366

PETER C. ANDRESEN
GEORGE FRANCIS PASTON
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 302
1901 GEORGIA AVE., N.W.
WASHINGTON, D.C. 20001

SETTLEMENT STATEMENT FOR Lewis

Property: Mt. Vernon TO: Jul 13 197

Young Contracting Co., Inc.

Case No. 72-2471

Liability is assumed by the law firm for the accuracy of any information furnished by others or for any matters not of record unless otherwise noted. Responsibility is not assumed for any monies due or payable, which at time of settlement are charged or credited upon assignment of funds not at such time available. Said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT	CREDIT
Purchase Price or Loan Proceeds		$ 12,000.00 ✓
Deposit		
Broker Commission		
– First Mortgage or Trust — Liber Bank	5,000.00	
Interest Adjustment		
– Second Mortgage or Trust		
Interest Adjustment		
Adjust State & County (and F.C.D.C.) Tax at $ 136.10	5.92 ✓	
Adjust Town/Land (and F.C.) Tax at $ 135.88	6.08	
Adjust Rent at $		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( )		
Tax Certification & Service		
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report/Truth in Lending		
Release/Trustee Fee		
Notary Public Fee		
Survey		
Recording & Service: Deed $; Mtg. or Trust $		
Release $; $		
Prepare: Deed $; Mtg. or Trust $		
Release $; $		
State Recording Tax Stamps		
State Transfer Tax		
County Transfer Tax		
Title Insurance & Application, Mortgagee & Owners		
Examine Title		
Title Certificate		
Deposit in Escrow for lender:		
Insurance ... Months		
Taxes ... Months		
Receipt of loan proceeds from Chevy Chase Bank		3,000.00
Settlement Charge		
Balance Due From Buyers by Check		
Balance Due To Sellers or Mortgagors	4,991.00	
TOTALS	$ 5,000.00	$ 15,000.00

CERTIFIED TRUE COPY

Approved and Copy hereof received:
Mt. Vernon Abstract Co.

4

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3366

PETER C. ANDRESEN
GEORGE FRANCIS PASTON
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 302
1901 GEORGIA AVE., N.W.
WASHINGTON, D.C. 20001

SETTLEMENT STATEMENT FOR Berger

Property: Mt Vernon TO:

Young

Case No. 72-2471C

Liability is assumed by the law firm for the accuracy of any information furnished by others or for any matters not of record unless otherwise noted. Responsibility is not assumed for any monies due or payable, which at time of settlement are charged or credited upon assignment of funds not at such time available. Said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
Audit
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT	CREDIT
Purchase Price or Loan Proceeds	$ 12,000.00 ✓	$
Deposit		
Broker Commission		
– First Mortgage or Trust — Liber Bank		5,000.00 ✓
Interest Adjustment		
– Second Mortgage or Trust		
Interest Adjustment		✓
Adjust State & County (and F.C.D.C.) Tax at $ 136.10		5.92 ✓
Adjust Town/Land (and F.C.) Tax at $ 135.88		6.08
Adjust Rent at $		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( )	✓	
Tax Certification & Service	2.50	
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report/Truth in Lending		
Release/Trustee Fee		
Notary Public Fee		
Survey		
Recording & Service: Deed $ 10.00 ; Mtg. or Trust $ 18.00	28.00	
Release $; $		
Prepare: Deed $; Mtg. or Trust $		
Release $; $		
State Recording Tax Stamps	52.80	
State Transfer Tax	60.00	
County Transfer Tax	120.00	
Title Insurance & Application, Mortgagee & Owners		
Examine Title		
Title Certificate		
Deposit in Escrow for lender:		
Insurance ... Months		
Taxes ... Months		
Settlement Charge	50.00	
Balance Due From Buyers by Check		7,305.12
Balance Due To Sellers or Mortgagors		
TOTALS	$ 12,313.30	$ 12,313.30

CERTIFIED TRUE COPY

Approved and Copy hereof received:
Chevy Chase Co.

#11 IT2

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

PETER C. ANDRESEN
GEORGE FRANCIS PAXTON
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 304
7903 GEORGIA AVE., N.W.
WASHINGTON, D.C. 20012

SETTLEMENT STATEMENT FOR Seller

Property: Lot 13, Block T, Sec. 10, Potomac Woods — Date: July 17 1972

Andreotti & Ciriglio

W.F. Vernon

Case No. 72-24-HA

Liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record unless examination is made. Responsibility is not assumed for any moneys due or payable, which at time of settlement are contingent upon assignment of funds not at that time available, said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT	CREDIT
Purchase Price or Loan Proceeds		$ 16,250.00
Deposit		
Broker Commission		
– First Mortgage or Trust		
Interest Adjustment		
– Second Mortgage or Trust		
Interest Adjustment		
Adjust State & County (~~and FHA~~) Tax at $ 136.19	5.92	
Adjust Town (and FHA) Tax at $ 138.88	6.04	
Adjust Rent at $		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( )		
Tax Certification & Service		
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report/Truth in Lending		
Release/Trustee Fee		
Notary Public Fee		
Survey		
Recording & Service: Deed $; Mtg. or Trust $		
Release $; $		
Prepare: Deed $; Mtg. or Trust $		
Release $; $		
State Recording Tax Stamps		
State Transfer Tax		
County Transfer Tax		
Title Insurance & Application, Mortgagee & Owners		
Examine Title		
Title Certificate		
Deposit in Escrow for lender:		
Insurance ... Months		
Taxes ... Months		
Settlement Charge	35.00	
Balance Due From Buyers by Check	8,753.06	
Balance Due To Sellers or Mortgagors		
TOTALS	$ 16,250.00	$ 16,250.00

CERTIFIED TRUE COPY

Approved and Copy hereof received:

#12 IT2

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

PETER C. ANDRESEN
GEORGE FRANCIS PAXTON
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 304
7903 GEORGIA AVE., N.W.
WASHINGTON, D.C. 20012

SETTLEMENT STATEMENT FOR Buyer

Property: Lot 13, Block T, Sec. 10, Potomac Woods — Date: July 17 1972

Frederick Andreotti & Rocco Ciriglio

W.F. Vernon Development Corp. or assigns — Case No. 72-24-HA

Liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record unless examination is made. Responsibility is not assumed for any moneys due or payable, which at time of settlement are contingent upon assignment of funds not at that time available, said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT	CREDIT
Purchase Price or Loan Proceeds	$ 16,250.00	$
Deposit		
Broker Commission		
– First Mortgage or Trust		
Interest Adjustment		
– Second Mortgage or Trust		
Interest Adjustment		
Adjust State & County (~~and FHA~~) Tax at $ 136.19		5.92
Adjust Town (and FHA) Tax at $ 138.88		6.04
Adjust Rent at $		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( )		
Tax Certification & Service		
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report/Truth in Lending		
Release/Trustee Fee		
Notary Public Fee		
Survey		
Recording & Service: Deed $; Mtg. or Trust $		
Release $; $		
Prepare: Deed $; Mtg. or Trust $		
Release $; $		
State Recording Tax Stamps		
State Transfer Tax		
County Transfer Tax		
Title Insurance & Application, Mortgagee & Owners		
Examine Title		
Title Certificate		
Deposit in Escrow for lender:		
Insurance ... Months		
Taxes ... Months		
Settlement Charge		
Balance Due From Buyers by Check		
Balance Due To Sellers or Mortgagors		
TOTALS	$	$

CERTIFIED TRUE COPY

Approved and Copy hereof received:

TITLE INSURANCE COMPANY OF MINNESOTA
APPROVED ATTORNEYS REPORT OF TITLE

#13

72-242 Case No.

Young Contracting Co., Inc. Purchaser or Owner

ATTORNEY'S FINAL REPORT

I have continued my examination of this title from the date of my foregoing report, to the date certified below, as of which date the status of title is as follows:

Fee Simple Title Vested In
Young Contracting Co., Inc.

(Tenancy)

Subject only to the items in my previous report numbered

2 after 6/30/72, 4 a,b&c, 5,6,7,8.

And subject to the instrument which is the subject matter of the binder from
Young Contracting Co., Inc. ,to
Allan Lang, Marvin R. Lang & Richard G. Cohan , Tr. for
Standard Savings & Loan Assn. of Gaithersburg securing
$ 52,000.00 .

7/18/72
Dated

7/19/72 at 10:11 A.M.
Recording Date

Instrument No.

Deed Book Page

Montgomery
County

Remarks:

Constuction loan, no ground advanc
insure proceeds only as advanced.

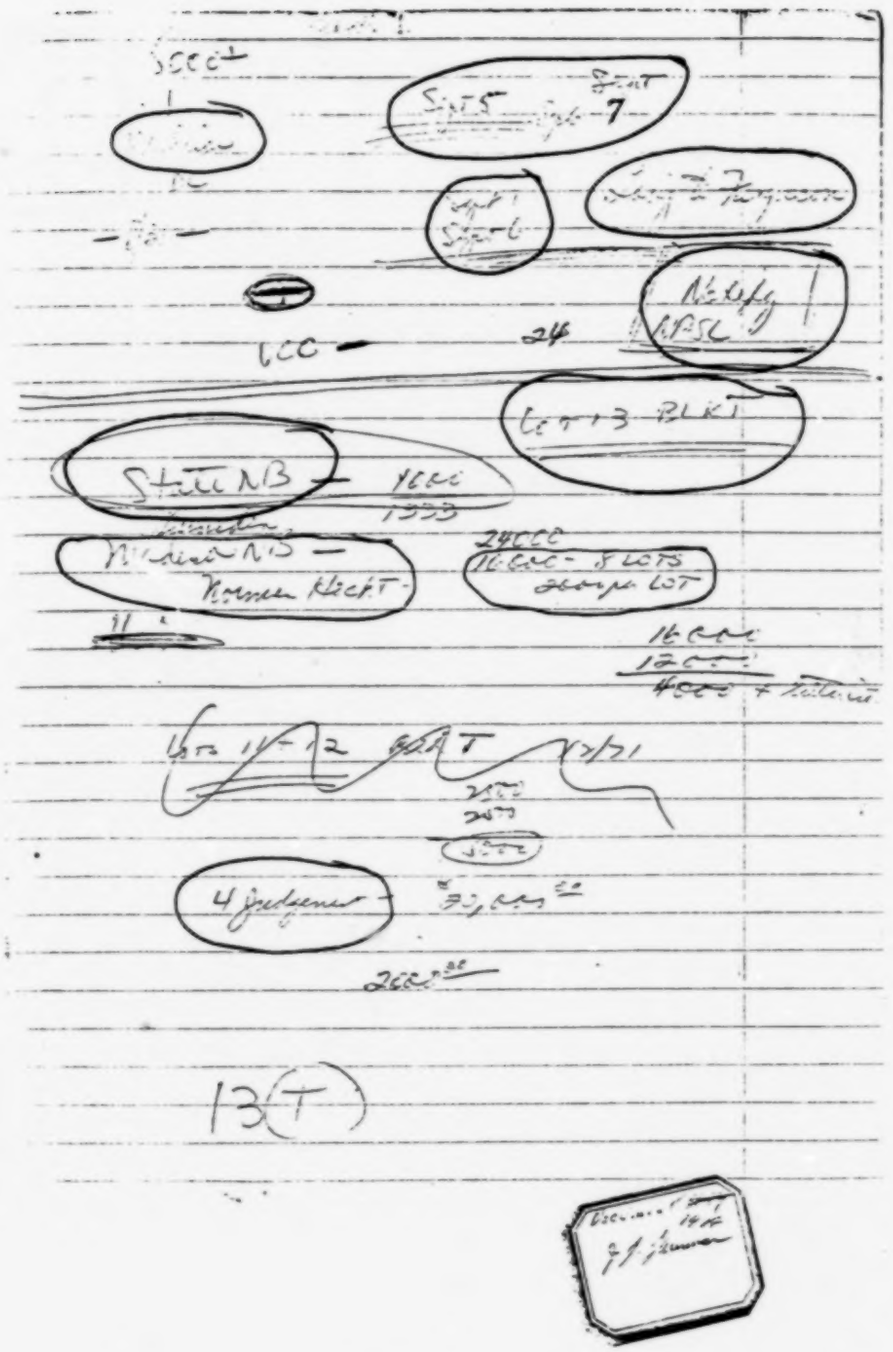
Nothing has come to the undersigned's attention affecting security instrument as a valid first lien upon the aforesaid property and (a) so far as known to the undersigned, there is no dispute among attorneys of the local bar as to the validity of the title to the real estate covered by this report, and (b) the title is in no way dependent upon the validity of the sale of the property for delinquent taxes or assessments.

July 19 , 19 72 , at 10:11 A.M.
Date Certified To

Peter C. Andresen
Attorney.

BY:
Member of firm

(19A)



(14B)

TITLE INSURANCE COMPANY OF MINNESOTA
APPROVED ATTORNEYS REPORT OF TITLE

72-242 Case No.

Young Contracting Co., Inc. Purchaser or Owner

ATTORNEY'S FINAL REPORT

I have continued my examination of this title from the date of my foregoing report, to the date certified below, as of which date the status of title is as follows:

Fee Simple Title Vested In
Young Contracting Co., Inc.
(Tenancy)

Subject only to the items in my previous report numbered

2 after 6/30/72, ~~3~~ 4 a,b&c, 5, 6, 7, 8.

And subject to the instrument ~~[illegible]~~

Young Consacting Co., Inc.
Peter C. Andresen & Lori J. Hall, to
Mt. Vernon Development Corp., Tr. for
$ 5,000.00 securing

7/17/72
Dated

7/19/72 at 10:12 A.M.
Recording Date

Instrument No.

Deed Book Page

Montgomery
County

Remarks:
Owners policy for deed from Raffalle Antonelli & Rocco Caniglia to new owner dtd 6/24/72, rec 7/19/72 at 10:10 A.M. Cons: $12,000.00 (only)

(Construction loan also recorded but insured under binder, policy to be issued after funds advanced.)

Nothing has come to the undersigned's attention affecting security instrument as a valid first lien upon the aforesaid property and (a) so far as known to the undersigned, there is no dispute among attorneys of the local bar as to the validity of the title to the real estate covered by this report, and (b) the title is in no way dependent upon the validity of the sale of the property for delinquent taxes or assessments.

July 19, 19 72, at 10:15 A.M.
Date Certified To

Peter C. Andresen
Attorney

BY:
Member of firm

(14B)

Profit - 1

Case # 72-

Date	To Whom or From Whom	Ck	Escrow #2 Incoming	Outgoing	Future
	Buyers ck.				
	Lenders ck.				
	Selling Brokers ck. (Deposit over commission)				
	Selling Brokers Commission				
	Listing Brokers Commission				
	Seller				
	1st Trust				
	2nd Trust				
	State Stamps & Recording fee				
	Trans. Tax				
	Federal Stamp - Postmaster				
	Taxes				
	City Taxes				
	Water bill				
	MLS fee				
	Title Insurance				
	Fire Insurance				
	Survey				
	Termite Inspection				
	Trustee Release fee				

(#16)

Concert - 016-7000

2 checks for Clark-King

Filed Settlement Title Services Closing Notice

Raffaele Antonelli
& Rocco
Caniglia
J/T

10,500.00 13 (T)

1,000.00 St Nat.

Lumaden 1333.00

(#17)

TITLE INSURANCE COMPANY OF MINNESOTA
APPROVED ATTORNEYS REPORT OF TITLE

File No. _____

TO: THE TITLE INSURANCE COMPANY OF MINNESOTA

The undersigned hereby certifies title to property located in the ~~City of~~ _____, County of Montgomery, State of Maryland, described as follows (Attach copy if description is lengthy)

SCHEDULE A

Lot numbered Thirteen (13) in Block lettered "T", in the subdivision known as " POTOMAC WOODS, Section Ten (10)", as per plat recorded at Plat Book 83, Plat 8373, among the Land Records of Montgomery County, Maryland.

is marketable and vested in fee simple as of the date hereof in Clark-King Construction Company, Inc.

under Deed from Alire, Inc.

dated 12/18/64 and recorded 2/3/65 in Book 3322 Page 73

of the records of Montgomery County, Maryland

SUBJECT TO:

1. Mortgages (Deeds of Trust) None

Assmt # 17

2. City, County, and State Taxes, Special Assessments.
State and County taxes paid thru 6/30/70
WSSC FFBC taxes paid thru 12/31/69

3. Judgments, if any.
None

4. Easements, recorded leases, other liens, objections and defects as follows (if set forth in restrictive covenants, refer to paragraph no.)

a. Rights of way to Chesapeake and Potomac Telephone Company in usual form recorded at Liber 206, folio 51 and Liber 246, folio 120.
b. Easement granted to Pepco and Chesapeake and Potomac Telephone Company recorded at Liber 3411, folio 271.
c. Temporary slope easement as shown on record plat.

SCHEDULE B

per Anderson

5. Covenants or restriction (attach copy). DATED 10/7/65 RECORDED 10/8/65 IN Book 3420 Page 211
Restrictions, if any, do not contain a forfeiture provision and have not been violated.

6. Building set back lines as noted on plat recorded (if set forth in restrictive covenants, refer to paragraph number) Minimum Building Restriction lines per dedication. ~~Under restriction lines have not been violated, and this policy insures against violation thereof will not cause a forfeiture or reversion of title~~

7. Matters of survey if survey furnished, are there any errors or discrepancies? None

8. Mechanics' and materialmen's liens: if filing period has expired, so state, otherwise waivers must be submitted to remove this exception. ~~Lien rights to be terminated.~~ Waiver Req.

9. Rights and claims of parties, other than owners, in possession, if any. None

The undersigned hereby certifies the above is based on a personal examination of all public records affecting title for a period of 60 years, and to his knowledge there is no dispute as to the validity thereof.

This is a sale to Raffaele Antonelli and Rocco Caniglia, as joint tenants

This is a refinance only ☐

Binder requested ☐ Yes ☐ No

The undersigned applies for the following policies, insuring as Lender, Amount of Loan $ ~~10,000.00~~

as Purchaser, Amount of Sale $ _____

The sale and/or loan will be Settled at the office of Peter B. Anderson, 3200 Devon, Wheaton, Md., Construction

Washington, D.C. 7111

Oct. 19 68 2:00 P.

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

WASHINGTON OFFICE
SUITE 301
1511 GEORGIA AVENUE N.W.
WASHINGTON, D.C. 20011

SETTLEMENT STATEMENT FOR Buyer

Property: Lot 13, Block T, Sec. 10, Potomac Woods — Date: November 1, 1969

Clark-King Construction Co., Inc. — TO:

Raffaele Antonelli and Rocco Cdoiglia, Joint tenants — Case No. 69-351

No liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record where reliance is made. Responsibility is not assumed for any monies due or payable, which at time of settlement are contingent upon assignment of funds not at such time available, said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT	CREDIT
Purchase Price or Loan Proceeds	$ 10,000.00	$
Deposit Credits given by Seller		10,000.00
Broker Commission		
– First Mortgage or Trust		
Interest Adjustment		
– Second Mortgage or Trust		
Interest Adjustment		
Adjust State & County (and ~~F.F.B.C.~~) Tax at $65.40	41	
Adjust Town/~~Land~~ Tax at $ 01.95	70.51	
Adjust Rent at $		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( )		
Tax Certification & Service	6.50	
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report		
Release/Trustee Fee		
Notary Public Fee	1.00	
Survey		
Recording & Service: Deed $14.00; Mtg. or Trust $	14.00	
Release $; $		
Prepare: Deed $15.00; Mtg. or Trust $	15.00	
Release $; $		
State Recording Tax Stamps	11.00	
~~Internal Revenue Tax Stamps~~ State Trans. Tax	50.00	
Transfer Tax (County)	100.00	
Title Insurance & Application, ~~Mortgagee~~ & Owners	45.00	
Examine Title	100.00	
Title Certificate		
Deposit to Escrow for Lender:		
Insurance .... Months		
Taxes ..... Months		
~~Refile 2 pay and release Deed of Trust to Lender~~		
~~Deposit for Delinquent Taxes to 1969 on~~		
~~Lot 13 Block T~~		
~~Service Charge~~		
Settlement Charge	15.00	
Balance Due From Buyers by Check		[illegible]
Balance Due To Sellers or Mortgagors		
TOTALS	$ [illegible]	$ [illegible]

Approved and Copy hereof received:

CERTIFIED TRUE COPY

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

WASHINGTON OFFICE
SUITE 301
1511 GEORGIA AVENUE N.W.
WASHINGTON, D.C. 20011

SETTLEMENT STATEMENT FOR Buyer

Property: Lot 13, Block T, Sec. 10, Potomac Woods — Date: November 1, 1969

Clark-King Construction Co., Inc. — TO:

Raffaele Antonelli and Rocco Cdoiglia, Joint tenants — Case No. 69-351

No liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record where reliance is made. Responsibility is not assumed for any monies due or payable, which at time of settlement are contingent upon assignment of funds not at such time available, said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT	CREDIT
Purchase Price or Loan Proceeds	$ 10,000.00	$
Deposit Credits given by Seller		10,000.00
Broker Commission		
– First Mortgage or Trust		
Interest Adjustment		
– Second Mortgage or Trust		
Interest Adjustment		
Adjust State & County (and ~~F.F.B.C.~~) Tax at $65.40	41	
Adjust Town/~~Land~~ Tax at $ 01.95	70.51	
Adjust Rent at $		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( )		
Tax Certification & Service	6.50	
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report		
Release/Trustee Fee		
Notary Public Fee	1.00	
Survey		
Recording & Service: Deed $14.00; Mtg. or Trust $	14.00	
Release $; $		
Prepare: Deed $15.00; Mtg. or Trust $	15.00	
Release $; $		
State Recording Tax Stamps	11.00	
~~Internal Revenue Tax Stamps~~ State Trans. Tax	50.00	
Transfer Tax (County)	100.00	
Title Insurance & Application, ~~Mortgagee~~ & Owners	45.00	
Examine Title	100.00	
Title Certificate		
Deposit to Escrow for Lender:		
Insurance .... Months		
Taxes ..... Months		
~~Refile 2 pay and release Deed of Trust to Lender~~		
~~Deposit for Delinquent Taxes to 1969 on~~		
~~Lot 13 Block T~~		
~~Service Charge~~		
Settlement Charge	15.00	
Balance Due From Buyers by Check		[illegible]
Balance Due To Sellers or Mortgagors		
TOTALS	$ [illegible]	$ [illegible]

Approved and Copy hereof received:

CERTIFIED TRUE COPY

141 (#19)

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

PETER C. ANDRESEN
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 202
7401 GEORGIA AVENUE, N. W.
WASHINGTON, D. C. 20012

SETTLEMENT STATEMENT FOR Allen

Property: _____ Date _____

No liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record when examination is made. Responsibility is not assumed for any moneys due or payable, which at time of settlement are contingent upon arrangement of funds not at such time available, said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This form acts as agent for the title insurance company and may receive a portion of said premium as its commission.

Case No. 69-351

	DEBIT	CREDIT
Purchase Price or Loan Proceeds	$	$ 15,000
Deposit ... Violet Mae Thompson	15,000 00	
Broker Commission		
– First Mortgage or Trust ... Atlantic	6,300 00	
Interest Adjustment		
– Second Mortgage or Trust ... Atlantic	1,200 00	
Interest Adjustment		
Adjust State & County (and F.P.D.C.) Tax at $65.40		41 21
Adjust Town/Land Tax at $. 111.25		70 04
Adjust Rent at $.		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( )		
Tax Certification & Service		
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report		
Release/Trustee Fee ... Dixon	42 00	
Notary Public Fee		
Survey		
Recording & Service: Deed $. ... ; Mtg. or Trust $.		
Release $. ... ; ... $.	50 00	
Prepare: Deed $. ... ; Mtg. or Trust $.		
Release $. ... ; ... $.		
State Recording Tax Stamps		
Internal Revenue Tax Stamps		
Transfer Tax		
Title Insurance & Application, Mortgagee & Owners		
Examine Title		
Title Certificate		
Deposit in Escrow for lender:		
Insurance ... Months		
Taxes ... Months		
Settlement Charge	50 00	
Balance Due From Buyers by Check		
Balance Due To Sellers or Mortgagors		2,937 29
TOTALS	$ 17,992 50	$ 17,992 50

CERTIFIED TRUE COPY

Approved and Copy hereof received:

_____

_____

(#21)

TITLE INSURANCE COMPANY OF MINNESOTA
APPROVED ATTORNEY'S REPORT OF TITLE

69-351 Case No.

Raffaele Antonelli and Rocco Caniglia Purchaser or Owner, as joint tenants

ATTORNEY'S FINAL REPORT

Released 12/1/69

I have continued my examination of this title from the date of my foregoing report, to the date certified below, as of which date the status of title is as follows:

Fee Simple Title Vested In
Raffaele Antonelli and Rocco Caniglia
joint tenants (Tenancy)

Subject only to the items in my previous report numbered

2 after 6/30/70, 4, 5, 6 & 7

And subject to the instrument which is the subject matter of the binder from _____, to _____. Tr. for _____ securing $ _____.

Dated _____

Recording Date _____

Instrument No. _____

Deed Book _____ Page _____

County _____

Remarks: Issue Owner's policy for $10,000.00, Deed dated 10/31/69, rec. 11/28/69 at 11:50 A.M. from Clark-King Construction Company, Inc. to Raffaele Antonelli and Rocco Caniglia.

mail it.

see endorsement

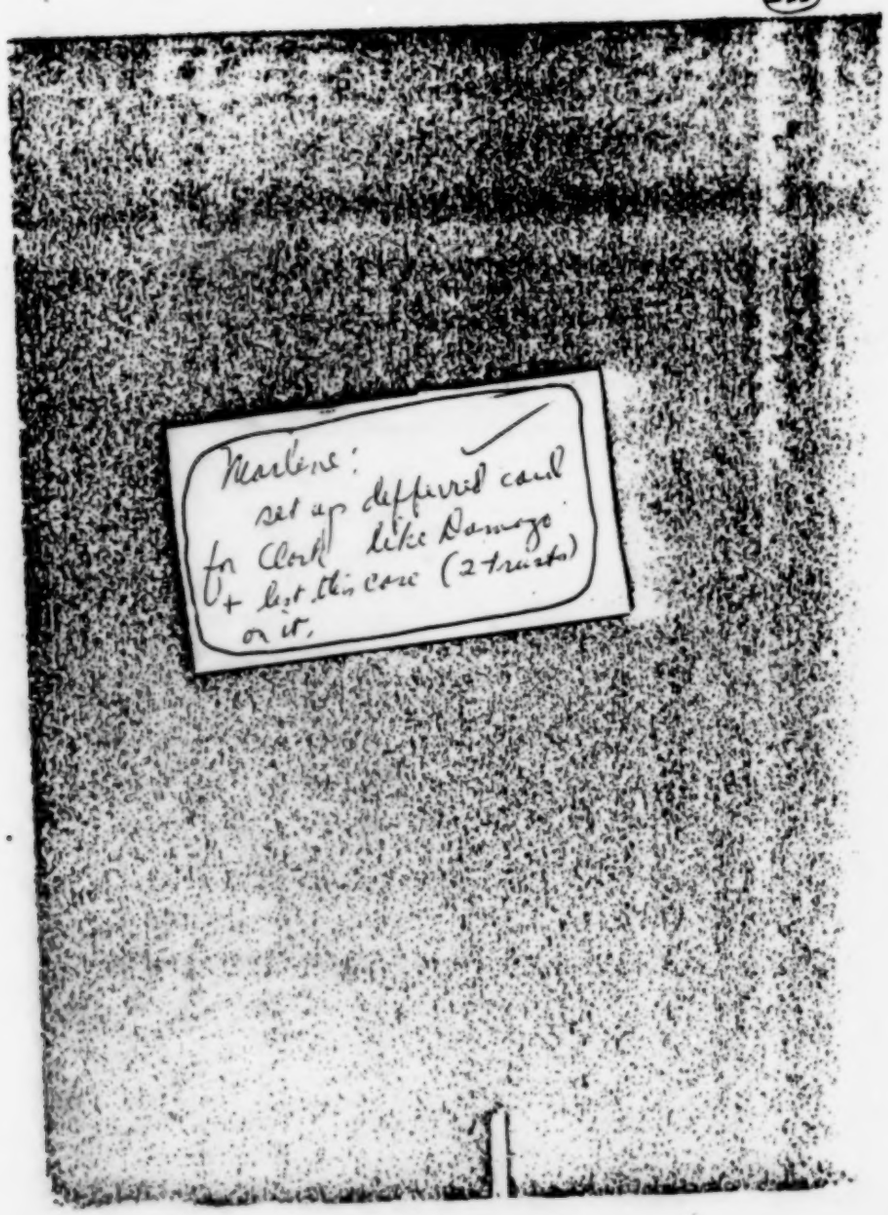
Nothing has come to the undersigned's attention affecting security instrument as a valid first lien upon the aforesaid property and (a) so far as known to the undersigned, there is no dispute among attorneys of the local bar as to the validity of the title to the real estate covered by this report, and (b) the title is in no way dependent upon the validity of the sale of the property for delinquent taxes or assessments.

November 28, 19 69, at 11:50 A. M.
Date Certified To

Peter C. Andresen
Attorney

BY: _____
Member of Firm

(#33)



Profit - $

CLARK KING Re ANTONELLI Case # 69-151

Date	To Whom or From Whom	Ck #	Escrow #2 Incoming	Outgoing	Future
11/24/69	Buyers ck. (Couples 2 Checks)		511.22		
	Lenders ck.				
	Selling Brokers ck. (Deposit over commission)				
	Selling Brokers Commission				
	Listing Brokers Commission				
	Seller				
	1st Trust				
	2nd Trust				
11/26/69	State Stamps & Recording fee	4611		55.00	
11/26/69	Trans. Tax	4612		66.00	
	Federal Stamp - Postmaster				
	Taxes				
	City Taxes				
	Water bill				
	MLS fee				
12/6/69	Title Insurance	4614		26.25	
	Fire Insurance				
	Survey				
	Termite Inspection				
12/6/69	Trustee Balance fee (Van [illegible])	✓	233.97		

Mar Cochran

#24

Approved
Pay 1.00
T.T.

Document #24
T. Thomas

#25

1+3

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3700 DECATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

OF COUNSEL
WILLIAM W MATTHEWS

WASHINGTON OFFICE
SUITE 303
7903 GEORGIA AVENUE, N W

SETTLEMENT STATEMENT FOR Berger

Property: Lot 7, Block T, Sec. 10 Potomac Woods Date July 9, 1970

Clark-Kiss Construction Company, Inc. 70:

Robert E. Holtzclaw et ux to Joyce Lynn Holtzclaw Case # 70-307

Responsibility is assumed by the law firm for the accuracy of any information furnished by others and any statement of record which could affect title. Responsibility is not assumed for any moneys due or payable which, at time of settlement are contingent upon the collection of funds not at such time available for disbursement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

	DEBIT	CREDIT
Purchase Price or Loan Proceeds	$ 48,660.00	$
Deposit		2,450.00
Broker Commission		
– First Mortgage or Trust Enterprise		38,000.00
Interest Adjustment 7/31/70 - 8/1/70	8.21	
– Second Mortgage or Trust		
Interest Adjustment		
Adjust State & County (and F.P.D.C.) Tax at $ 44.88		1.12
Adjust Town (and F.P.D.) Tax at $ 10.7.70		2.32
Adjust Rent at $		
Deposit For Payment Water Bill		
Fire Insurance: Premium ( ) Adjustment ( ) furnished		
Tax Certification & Service	6.50	
Loan Commission and Discount		
Inspection/Conveyancing Fee		
Appraisal/Assumption Fee		
Credit Report		
Release/Trustee Fee	4.00	
Notary Public Fee	60.00	
Survey		
Recording & Service: Deed $ 4.00 ; Mtg. or Trust $ 20.50	24.50	
Release $; $		
Prepare: Deed $ 25.00 ; Mtg. or Trust $	25.00	
Release $; $		
State Recording Tax Stamps	158.40	
State Transfer Tax	240.00	
County Transfer Tax	480.00	
Title Insurance & Application, Mortgagee $	110.00	
Examine Title	220.00	
Title Certificate		
Deposit in Escrow for Lender:		
Insurance .... Months		
Taxes 11 Months Advanced	1,056.00	
NOTING Enterprise Conveyance	30.00	
Settlement Charge	55.00	
Balance Due From Buyers by Check		7,834.17
Balance Due To Sellers or Mortgagors		
TOTALS	$ 50,417.61	$ 50,417.61

CERTIFIED TRUE COPY

Approved and Copy hereof received

PETER CHRISTIAN ANDRESEN
ATTORNEY AT LAW
3706 BEGATUR AVENUE
KENSINGTON, MARYLAND 20795
933-3388

PETER C. ANDRESEN
OF COUNSEL
WILLIAM H. MATTHEWS

WASHINGTON OFFICE
SUITE 303
8403 GEORGIA AVENUE N. W.
WASHINGTON D. C. 20012

SETTLEMENT STATEMENT FOR Sellers

Property: _____ Date _____

Case No. 70-307

Liability is assumed by the law firm for the accuracy of any information furnished by others or for any matter not of record which affects title except as herein specifically set forth. Responsibility is not assumed for any moneys due or payable, which at time of settlement are encumbrances, and which are to be paid out of funds not at such time available, said settlement and the payment of proceeds and disbursements hereunder are subject to receipt of such assignments.
This firm acts as agent for the title insurance company and may receive a portion of said premium as its commission.

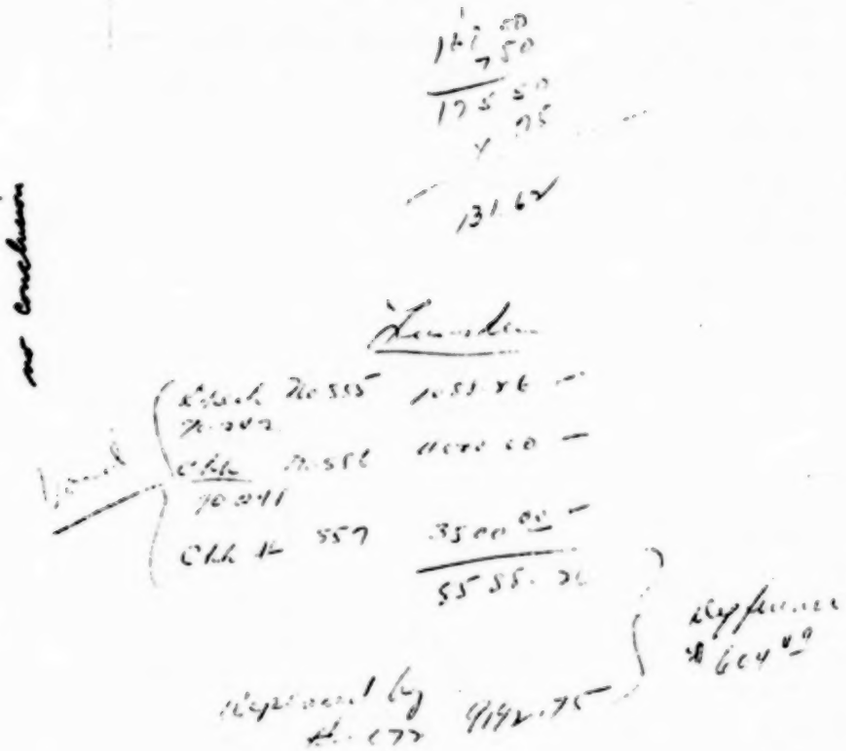
	DEBIT		CREDIT	
Purchase Price or Loan Proceeds	$		$ 40000	00
Deposit Held by Seller	4450	00		
Broker Commission County Wide Realty	2000	00		
– First Mortgage or Trust Enterprise	35,000	00		
Interest Adjustment To date	240	12		
– Second Mortgage or Trust State of MD	1,000	00		
Income Adjustment 2nd Trust Lenders	1,333	00		
Adjust State & County (and P.F.B.C.) Tax at $ [illegible]	1	12		
Adjust Town/Land Tax at $ 197.70	2	32		
Adjust Rent at $				
Deposit For Payment Water Bill				
Fire Insurance: Premium ( ) Adjustment ( ) Cancel				
Tax Certification & Service				
Loan Commission and Discount				
Inspection/Conveyancing Fee				
Appraisal/Assumption Fee				
Credit Report				
Release/Trustee Fee	90	00		
Notary Public Fee				
Survey			45	00
Recording & Service: Deed $; Mtg. or Trust $				
(d) Release $; $	70	00		
Prepare: Deed $; Mtg. or Trust $				
Release $; $				
State Recording Tax Stamps				
State Transfer Tax				
County Transfer Tax				
Title Insurance & Applic. Mortgage & Owners				
Commission Gen. Trust: F.B. Leap	2000	00		
Trust Fidelity & Deposit Fidelity	2000	00		
Deposit - Commission Clifton T. Perkins			55	19
Insurance Month				
Loan Mortgage George Mason	1000	00 ✓		
Assignment Interest Accrued	1500	00		
Settlement CHARGE	50	00		
Balance Due From Buyers or Check			2,645	17
Balance Due To Sellers or Mortgagors				
TOTALS	$ 50,746	06	$ 50,746	06

ESTIMATED TITLE CHARGES

Approved and Copy hereof received.

Clerk Key Re Hallgeiant Case 0 70-307

Date	To Whom or From Whom	Ch #	Escrow # / Incoming	Outgoing	Future
	Buyers ck.		6114 61		
	Lenders ck. Enterprise		14850		
	Selling Brokers ck. (Deposit over commission)				
	Selling Brokers Commission				
	Listing Brokers Commission				
	Seller				
	1st Trust				
	2nd Trust				
	State Stamps & Recording fee	585		412 00	
	Trans. Tax	53		412 00	
	Federal Stamp - Postmaster				
	Taxes				
	City Taxes				
	Water bill				
	MLS fee				
	Title Insurance	2331		81 67	
	Fire Insurance				
	Survey				
	Termite Inspection				
	Trustee Release fee	✓	55 19		
11/14/80	Mannick Inc	580		1000 00	
	[illegible]	581		500 00	
	[illegible]			[illegible]	
12/22/80	[illegible]			[illegible]	
	[illegible]			[illegible]	
	[illegible]			[illegible]	



TITLE INSURANCE COMPANY OF MINNESOTA
APPROVED ATTORNEYS REPORT OF TITLE

(28)

70-207 Case No.

Robert E. Holtzclaw et ux Joyce Lynn Holtzclaw / Purchaser or Owner

ATTORNEY'S FINAL REPORT

I have continued my examination of this title from the date of my foregoing report, to the date certified below, as of which date the status of title is as follows:

Fee Simple Title Vested In

Robert W. Holtzclaw et ux Joyce Lynn Holtzclaw
Tenants by the Entirety
(Tenancy)

Subject only to the items in my previous report numbered

2, after 6/30/70: 4a, 4b, 4c, 5, 6, 8

And subject to the instrument which is the subject matter of the binder from

Robert W. Holtzclaw et ux Joyce Lynn Holtzclaw, to
First National Bank of Washington, Tr. for
Enterprise Federal Savings and Loan Association securing
$18,000.00.

July 9, 1970
Dated

July 17, 1970 at 2:59 P.M.
Recording Date

Instrument No.

Deed Book Page

Montgomery
County

Remarks: Issue Owners Policy for $48,000.00. Deed from Clark King Construction Co. to Robert E. Holtzclaw et ux Joyce Lynn Holtzclaw, dated 7/9/70, rec. 9/17/70 at 2:58 P.M.
Mail ownowers at:
1887 Milboro Drive,
Rockville, Maryland 20850

Nothing has come to the undersigned's attention affecting security instrument as a valid first lien upon the aforesaid property and (a) so far as known to the undersigned, there is no dispute among attorneys of the local bar as to the validity of the title to the real estate covered by this report, and (b) the title is in no way dependent upon the validity of the sale of the property for delinquent taxes or assessments.

July 17, 1970, 19____, at 2:59 P. M.
Date Certified To

Peter C. Andresen
Attorney

BY:
Member of Firm